

otherwise required by 50 CFR part 17, if imported directly from the country of origin (including shipments transited or transshipped through a third country while under customs control) into the United States if the crocodilian skin bears an intact, uncut tag from the country of origin in compliance with 50 CFR part 23, including those provisions implementing the CITES resolution on the universal tagging system.

(v) *Noncommercial accompanying baggage.* The conditions of paragraphs (c)(3)(ii) (A) and (B) of this section for products made of Nile crocodile or of saltwater crocodile from Australia or Papua New Guinea shall not apply to noncommercial accompanying personal baggage. Furthermore, no permits

required by 50 CFR part 17 will be required for import of crocodilian skins and parts of Nile crocodile listed on Appendix II or of saltwater crocodile from Australia or Papua New Guinea when imported as non-commercial accompanying personal baggage.

(4) *Publication of information.* The Service shall publish appropriate notices of information in the **Federal Register** that shall list the countries that meet the conditions described in paragraph (c)(3)(iii) of this section. Based on the notices published pursuant to this section, the Service will maintain a current list of countries that meet the conditions described in paragraph (c)(3)(iii) of this section, and from which import or re-export of Nile

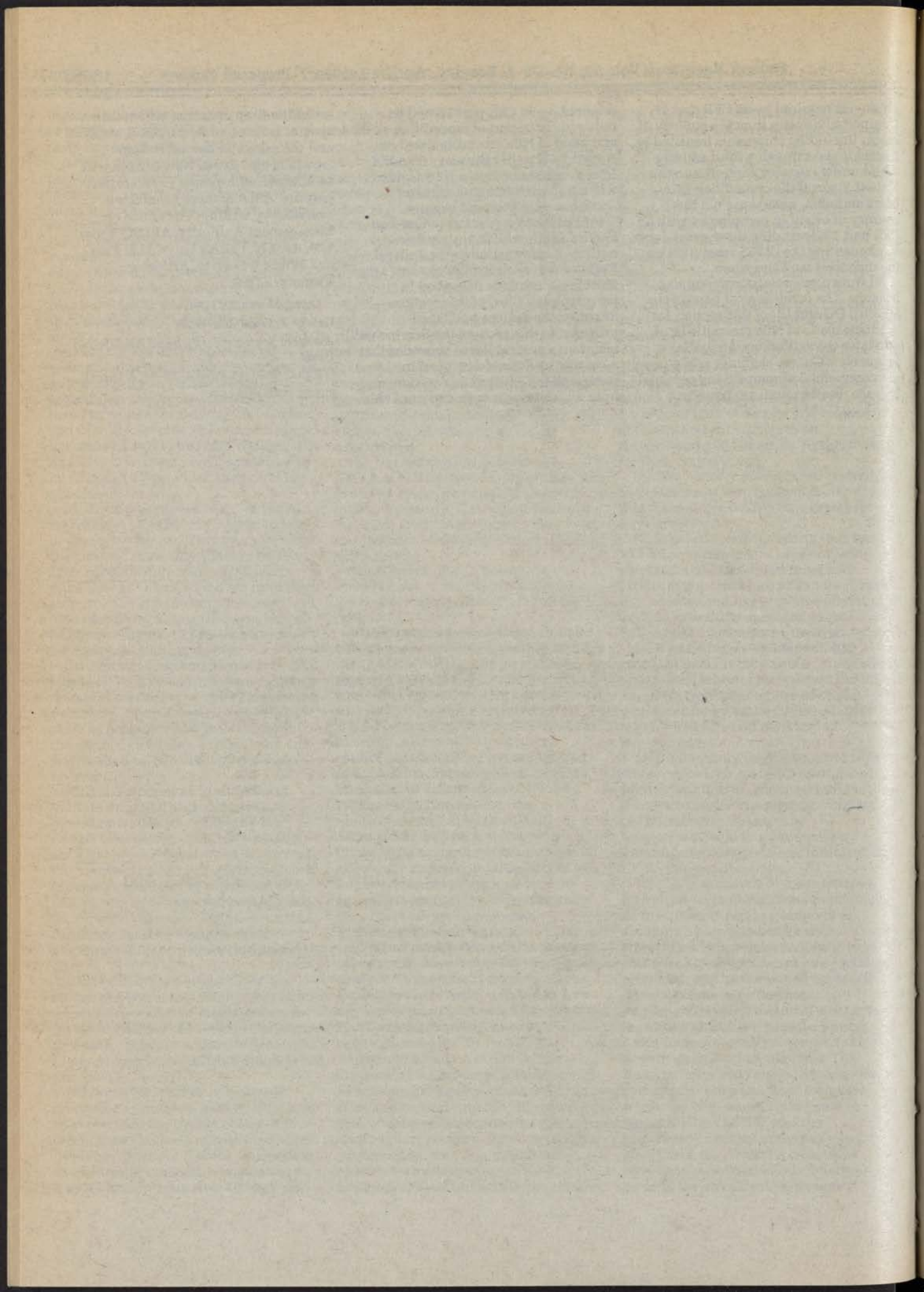
crocodile from countries where this species is listed in Appendix II of CITES and the saltwater crocodile from Australia and Papua New Guinea will be allowed with proper CITES export permits. A list of these countries is available by writing: The Office of Management Authority, ARLSQ Room 420, 4401 N. Fairfax Drive, U.S. Fish and Wildlife Service, Arlington, Virginia, 22203.

Dated: March 23, 1994.

George T. Frampton, Jr.,
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 94-9395 Filed 4-18-94; 8:45 am]

BILLING CODE 4310-55-P



Tuesday
April 19, 1994

Part VI

**Department of
Housing and Urban
Development**

**Office of the Assistant Secretary for
Public and Indian Housing**

**24 CFR Parts 905, 913, 964, and 990
Tenant Participation and Tenant
Opportunities in Public and Indian
Housing; Proposed Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Assistant Secretary for Public and Indian Housing

24 CFR Parts 905, 913, 964 and 990

[Docket No. R-94-1707; FR-3568-P-01]

RIN 2577-AB36

Public and Indian Housing Amendment to the Tenant Participation and Tenant Opportunities in Public and Indian Housing

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend regulations on tenant participation in public and Indian housing to add new policies, procedures and guidelines for tenant participation, revise the Resident Management Program to Tenant Opportunities Programs, and add regulations to govern the Family Investment Centers (FIC) Program. These changes would be made to address several weaknesses in the existing regulations which have interfered with successful program implementation.

DATES: Comments due: May 19, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Facsimile (FAX) are not acceptable. A copy of each communication submitted will be available for public inspection and copying on weekdays between 7:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: For questions concerning the Public Housing rule contact Dorothy Walker or Marcia Martin, Office of Resident Initiatives, room 4112, telephone (202) 708-3611, or 708-0850. For Indian Housing, contact Dom Nessi, Director, Office of Native American Programs, room 4141, telephone (202) 708-4015 (these are not toll-free numbers). Hearing- or speech-impaired persons may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service on 1-800-877-TDDY (1-800-877-8339) or 202-708-9300 (not a toll free number) for information on the program.

The address for the above listed persons is: Department of Housing and Urban Development, 451 7th Street SW.,

Washington, DC 20410. (The telephone numbers listed above are not toll-free.)

SUPPLEMENTARY INFORMATION:

I. Information Collections

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520).

The public reporting burden for each of these collections of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the preamble heading, Other Matters. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street SW., room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for HUD, Washington, DC 20503.

II. Background

Section 20 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437r) (the "1937 Act") was enacted to encourage increased resident management of public housing projects * * * "to promote formation and development of resident management entities." The Department implemented section 20 by regulations (24 CFR part 964 for Public Housing, and 24 CFR part 905, subpart O for Indian Housing), that governed tenant participation and resident management in public/Indian housing under Section 20 of the 1937 Act.

III. Overview of Public Housing Changes

Several weaknesses in the regulations have interfered with successful program implementation. The current regulations fail to establish clear and detailed policy on resident participation and guidance on the structure for public housing resident organizations. Additionally, the current regulations fail to establish specific requirements for resident involvement in public/Indian housing management, and a strong partnership between the PHAs/IHAs (thereinafter referred to as HAs) and resident councils. Internal conflict between

competing resident councils in a development poses serious problems to HUD with respect to program eligibility and participation, as well as HA recognition. The Department is concerned about the need to provide more details on how resident councils/resident management corporations should be structured and how to broaden tenant involvement in public housing.

The Department recognizes the need to increase the amount of cash contributions for resident council activities, presently limited at three (3) dollars per unit per year, and to compensate resident council officers who are serving as volunteers in the public housing community.

The Secretary asked a former top HUD official to develop policy recommendations on the role of residents in the management of public housing. Based on these recommendations, the Secretary established an Interim Resident Advisory Committee consisting of representatives of regional and state resident organizations who developed a Policy Paper on resident involvement in public housing. Public Housing Advocacy Groups: Public Housing Authorities Directors Association (PHADA), Council of Large Public Housing Authorities (CLPHA) and National Association of Housing Redevelopment Officials (NAHRO), were given an opportunity to review and comment on the Policy Paper.

Section 20 authorizes funds for technical assistance and training to resident councils (RCs)/resident management corporations (RMCs) to promote increased resident management of public housing. HUD's experience in providing grants to RCs/RMCs under the Public Housing Resident Management Program has revealed that major changes were needed in the provisions of the program. RCs/RMCs and HAs across the country overwhelmingly requested revamping of the program to assist in meeting their residents' need for economic development, education, job training and development, social services, and opportunities for other self-help initiatives.

Recommendations from the Interim Resident Advisory Committee on Tenant Involvement in Public Housing, and requests for changes in the Resident Management Technical Assistance Program resulted in the proposed comprehensive revision of 24 CFR part 964.

The major changes in the proposed rule would allow for broader, more flexible programs aimed at increasing the capacity of resident entities to

participate significantly in all aspects of public housing operations while simultaneously permitting further economic uplift opportunities, to the extent permitted under section 20 of the United States Housing Act of 1937. Section 20 requires that all activities funded under it be related to improved living conditions and public housing operations. (See §§ 905.967 and 964.205.) The Department is now proposing amendments to section 20 to permit funding of a broader range of tenant development activities to include activities that are not necessarily related to resident management or housing authority operations.

The current regulation on the Tenant Participation and Resident Management Program is proposed to be renamed "Tenant Participation and Tenant Opportunities in the Public Housing Program." The proposed regulations would include the Tenant Opportunities Program (TOP), which replaces the Resident Management Program under subpart C in the current regulation.

The revised program was created in response to requests from resident councils/resident management corporations and HAs across the country for a more flexible program to address the needs in their communities related to encouraging increased resident management activities as a means of improved living conditions and public housing operations. The revised program is designed to prepare residents to experience the dignity of meaningful work; to own and operate resident businesses; to move toward financial independence; to enable them to choose where they want to live; and to assure meaningful participation in the management of their housing developments. The authority for the TOP program comes from section 20 of the 1937 Act, which discusses resident management of public housing. Section 20(f) authorizes technical assistance and training. Financial assistance in the form of technical assistance grants is provided by the Secretary to RCs/RMCs to prepare for management activities in their housing development (hereinafter referred to as TOP technical assistance grants). Technical assistance grants are available for "the development of resident managed entities, including the formation of such entities, the development of the management capability of newly formed or existing entities, the identification of the social support needs of residents of public housing projects and the securing of such support." TOP technical assistance grants can enable residents to manage their developments or portions of their developments. The results are

significant and multifaceted. For example, resident managed activities have resulted in economic development, resident self-sufficiency, improved living conditions, and enhanced social services for residents (e.g., child care and other youth programs).

The Resident Management Program would continue to be an option to resident councils/resident management corporations who are interested in performing management functions in one or more projects of a HA. None of the requirements for the resident management program will be changed. However, some of the provisions are being moved to other regulations, or HUD documents. For example, the requirements under subpart C (§ 964.39) governing the operating subsidy, budget, operating reserves, etc. are proposed to be moved to 24 CFR Part 990—Annual Contributions for Operating Subsidy. The Department believes these provisions of § 964.39 are more appropriately placed in that regulation. Also, the requirements for the RMC management contract contents are being removed from subpart C and are contained in HUD Notice PIH 93-56 (HA) which also includes a model management contract. This contract must be followed unless HUD approves a requested change.

Subpart A would be expanded to add policies on partnerships between HAs and residents. For example, HAs are required to provide a duly elected resident council office space and meeting facilities, free of charge, for the purposes of conducting resident activities.

Also, the section on definitions (§ 964.7) would be amended by removing terms such as "resident council" and "resident management corporation" and expanding the definition of these terms to provide clarity on the eligibility of a voting member of the resident council and establish the frequency of elections for resident management corporations. The definitions for other terms such as "project" and "tenant participation" are eliminated.

The current rule under subpart B would be expanded substantially to establish policies and procedures for HAs with respect to resident participation activities. For example, HAs shall provide any funds they receive for resident participation activities to the duly elected resident council. Parts 990 and 905, subpart J would be amended to require an "add-on" of \$25 per unit per year to the HA's operating subsidy calculation, which would be paid to the HA only if appropriations were available for that

purpose, to support activities of the duly elected resident council. The HUD Circular HM 7475.9 dated February 10, 1992, authorized funds not to exceed three (\$3) dollars per unit per year. The Department believes that an increase of \$22 per unit per year is reasonable and, if available, would guarantee the resources necessary to create a bonafide partnership among the duly elected resident council and the HA. Strong partnerships are critical for achieving mutual goals contained in this subpart.

Also, HUD proposes to encourage HAs to provide stipends in an amount up to \$200 per month/per officer to resident council officers who serve as volunteers in the public housing development to carry out these duties and functions as officers of the resident council. The Department believes that these volunteers should be reimbursed for their expenses related to volunteer efforts, such as child care, transportation, special equipment, clothing, etc.

The current part 964 regulations lack specificity regarding resident elections and organizational policies, and have made it difficult to determine what is a duly elected resident council and that has caused conflicts among the residents.

The proposed regulations would add new policies and procedures for resident councils by defining what is a duly elected resident council, detailing minimum standards for elections of resident councils and specifying the relationship between the resident councils and resident management corporations. Resident councils would be required to meet HUD's election standards in order to receive official recognition from the HA and HUD, as well as to receive funds in conjunction with the conduct of resident council business. The role of the jurisdiction-wide resident council would be established under the proposed rule. The rule also contains provisions that expand the resident participation requirements to strongly support resident participation in all aspects of a HA's management operations and that give rights to residents to freely organize and represent their interests.

The proposed rule would add a new subpart D to implement the Family Investment Center (FIC) Program under section 22 of the 1937 Act (42 U.S.C. 1437t) (added by section 515 of the Cranston-Gonzalez National Affordable Housing Act). The FIC program provides families living in public housing with better access to educational and employment opportunities. This new subpart will be added to part 964 to include FIC because it complements the

Department's resident participation and self-sufficiency initiatives. The program was proposed by a national association on behalf of numerous housing authorities. Representatives from public/Indian housing authorities, resident councils/resident management corporations and nonprofit housing agencies were convened at the Department to discuss program provisions and provide policy recommendations during the initial program planning stage. Some HAs will combine their FIC and Family Self-Sufficiency (FSS) programs. This rule would provide that section 8 FSS Program participants are eligible to participate in the FIC program when it is combined with FSS, but that income exclusions that are provided to public housing residents participating in employment training and supportive service programs would not apply to Section 8 FSS families. The treatment of the FSS escrow account for public housing FIC/FSS families is not addressed in this proposed rule, but will be included in the final rulemaking.

Proposed § 964.320 provides HUD policy on training, employment and contracting of public/Indian housing residents under section 3 of the Housing and Community Development Act of 1968. Section 915 of the Housing and Community Development Act of 1992 made significant changes to section 3. HUD recently published a proposed rule implementing those changes (see 58 FR 52534, October 8, 1993). Section 3, as amended, requires that HAs make their best efforts, consistent with existing Federal, State, and local laws and regulations, to amend contracts for work to be performed in connection with development, operation and modernization assistance provided pursuant to sections 5, 9 and 14 of the U.S. Housing Act of 1937. As amended, section 3 establishes an order of priority to which the HA's efforts must be directed. Thus, the first level of priority is to residents of the housing development, for which the assistance is provided. This proposed rule includes provisions consistent with the proposed section 3 rule.

The reader should note that combination terms such as "tenant and resident", "tenant council", and "resident council", and "tenant management corporation" and "resident management corporation" are similar terms and may be used interchangeably. Hereafter, for ease of discussion, the proposed rule will use the terms resident, resident council and resident management corporation, as appropriate.

IV. Amendments of the Tenant Participation and Tenant Opportunities Program in Public Housing

A. Regulatory Actions: 964

Based on recommendations of the Interim Resident Advisory Committee, program experience, and comments from various Housing Interest Groups, the regulations are proposed to be revised to: (1) Expand tenant participation in various programs and involvement in public housing operations, and (2) change the Resident Management Program to the Tenant Opportunities Program (TOP), and (3) add a new subpart D to the 964 regulations which contains policies and procedures for the FIC Program.

This section discusses each of the specific regulatory revisions.

1. Subpart A would be amended as follows:

a. Section 964.1 Purpose would be streamlined.

b. Section 964.3 Applicability and scope would remain unchanged.

c. Section 964.7 Definitions would be amended by removing several definitions such as project and tenant participation; by moving terms such as Resident Council and Resident Management Corporation to a more appropriate section under subpart B, and by expanding definitions; and by adding new terms which relate to the FIC program.

d. Section 964.11 HUD policy on tenant participation would be amended to strongly support tenant participation in all the functions of a HA's management operations and give rights to residents to freely organize and represent their interests.

e. Section 964.12 HUD policy on Tenant Opportunities Program (TOP) would provide HUD's policy on the Tenant Opportunities Program. Subpart C of the current regulation would be changed from "Resident Management Program" to "Tenant Opportunities Program" (TOP). The name is being changed to TOP because it reflects the evolution of the program over time, to enhance resident capacity in a variety of ways, including job training, economic development, and self-sufficiency activities carried out by resident councils/resident management corporations in public housing. Resident management is a component of TOP and resident councils/resident management corporations may continue to engage in activities relative to public housing management. Tenant opportunities programs are proven to be effective in facilitating economic uplift as well as in improving the overall conditions in public housing.

f. Section 964.14 HUD policy on partnerships would be added to provide HUD policy on Partnerships between HAs and residents. Strong partnerships between HAs and resident councils/resident management corporations are key to the success of program objectives, and critical for achieving specific and mutual goals and creating positive change for residents in public housing.

g. Section 964.15 HUD policy on resident management would remain unchanged. This section states HUD's support for resident councils/resident management corporations who are interested in becoming resident managed entities in public housing.

h. Section 964.16 HUD role in activities under this part—Monitoring would be added to describe HUD's proactive responsibility for promoting tenant participation and tenant opportunities in public housing. It provides that HUD will monitor program progress to ensure efficient and effective operations pursuant to this rule.

i. Section 964.18 HA role in activities under subparts B&C would establish a stronger HA role under this subpart. HAs shall, upon request, provide office space to a duly elected resident council and shall negotiate in good faith usage of community space for meetings and other activities for residents. HAs have a responsibility to negotiate such usage of space with the duly elected resident council.

j. Section 964.24 HUD policy on FIC program would provide HUD's policy and support for the FIC program.

2. Subpart B would be amended as follows:

a. Section 964.100 Role of resident council which establishes the role of a resident council and Section 964.105 Role of the jurisdiction-wide resident council which establishes the role of a jurisdiction-wide resident council would be added to the rule.

b. Section 964.110 Resident membership on HA Board of Commissioners would encourage resident membership on HA Board of Commissioners.

c. Section 964.115 Resident council requirements would describe the provisions necessary for the Resident Council to receive official recognition from the HA and HUD. In the current rule, this provision was included in the definitions section, and in this proposed rule it becomes a separate section.

d. Section 964.117 Resident council partnerships would be added to encourage and promote partnerships between the resident councils and public/private organizations. While the Department encourages partnerships to

complement council activities, such organizations must not become the governing entity of the resident council.

e. Section 964.120 Resident management corporation requirements would establish characteristics in order to receive formal recognition by the HA and HUD. In the current rule, this was included in the definitions sections and in this proposed rule, it becomes a separate section.

f. Section 964.125 Eligibility for resident council membership would be added to provide guidance on eligibility for council membership. This section establishes that any member of a household, who is on the lease, may be a member of a resident council. However, in order to be a voting member of the resident council, a person's name must appear on the lease of a unit in the public housing development, and he/she must be: (1) A legal head of household (means the member of the family who is the head of the household for purposes of determining income eligibility and rent), or (2) 18 years of age or older.

g. Section 964.130 Election procedures and standards would be added to provide minimum standards for resident council elections including the requirement for supervision by an independent third party. HAs shall monitor the resident council's elections to ensure compliance with HUD's minimum standards.

h. Section 964.135 Resident involvement in HA management would be added to provide policy on resident involvement in HA management operations. Residents shall participate fully in the overall policy development and direction of a HA operations.

i. Section 964.140 Resident training would be added to encourage HAs to take the lead in providing training opportunities for public housing residents. If residents are willing, they may receive training from the HA and become involved in implementing various Federal programs.

j. Section 964.145 Conflict of interest would be added to provide policy on resident council officers serving as contractors or as employees of a HA.

k. Section 964.150 Funding tenant participation would be added to establish policy on funding duly elected resident councils. Subject to appropriations, HAs shall provide funds to the duly elected resident council for tenant participation activities. This rule also proposes amendment to 24 CFR part 990 for tenant services to include up to \$25 per unit per year, subject to the availability of appropriations, as an add-on to the Performance Funding System (PFS).

3. Subpart C would be amended as follows:

a. Section 964.200 General would be added to provide information on the provisions of the TOP.

b. Section 964.205 Eligibility would be added to define who is eligible to apply and receive a technical assistance grant, and would outline eligible activities under TOP.

c. Section 964.210 Announcement of funding availability would be added to describe notification of funding availability for obtaining funds to participate in TOP.

d. Section 964.215 Grant agreement would provide the terms of the grant agreement for the proposed activities under the TOP program.

e. Section 964.220 Technical assistance would describe HUD's commitment to fund TOP activities.

f. Section 964.225 Resident management requirements would provide minimal guidelines for HAs and residents for the performance of management functions.

g. Section 964.230 Audit and administrative requirements would provide audit and administrative guidelines for recipients of TOP grant funds and resident management corporations contracting with a HA for management responsibilities.

4. Subpart D would be added to the part 964 as follows:

a. Section 964.300 General would provide the purpose and program provisions of the FIC program. FIC provides families living in public housing with better access to educational and employment opportunities to achieve self-sufficiency and independence.

b. Section 964.305 Eligibility for FIC would provide eligible activities and requirements under the FIC program.

c. Section 964.308 Supportive services requirements for FIC would provide supportive services requirements essential for families living with children in public housing.

d. Section 964.310 Audit/Compliance Requirements for FIC would provide audit and compliance requirements governing the program.

e. Section 964.315 HAs role in FIC activities under this part would provide the process required to assure that HA residents are informed about FIC.

f. Section 964.320 HUD policy on training, employment, contracting and subcontracting of public/Indian housing residents under FIC would state HUD's policy on resident training, employment and contracting under FIC.

g. Section 964.325 Announcement of funding availability for FIC would indicate that the Notice of Funding

Availability (NOFA) will be published periodically and contain specific information regarding eligibility, funding criteria, etc.

h. Section 964.330 Grant set-aside assistance for FIC would state HUD's policy of permitting up to five percent (5%) of amounts available in any fiscal year to augment grants previously awarded under this program.

i. Section 964.335 Grant agreement for FIC would provide the grant agreement term.

j. Section 964.340 Resident compensation for FIC would provide guidelines governing employment compensation under this program.

k. Section 964.45 Treatment of income would provide provisions for income exclusions for any resident participating in the FIC program.

l. Section 964.350 Administrative Requirements for FIC would provide administrative and reporting requirements governing the FIC program.

B. Indian Housing Changes—Part 905

The proposed rule also revises 24 CFR part 905, subpart O, "Resident Participation and Opportunities". The Indian housing section is similar to its public housing counterpart, but does not contain some of the provisions in 24 CFR part 964 in an effort to streamline the regulations and tailor them specifically to the generally smaller size of most Indian Housing Authorities (IHA). However, all activities, functions and benefits permitted under any public housing resident programs will remain eligible activities, functions and benefits for Indian housing resident programs.

The major changes in the proposed rule will allow for broader, more flexible programs aimed at increasing the capacity of Indian housing resident organizations and resident management corporations to carry out their organizational functions in a more structured manner while simultaneously permitting further economic uplift opportunities.

Within the subpart there is a general section; a Tenant Opportunities Program (TOP) section; and a Family Investment Centers Program section. The current Indian Housing Resident Management Program under existing regulations is viable and remains an option under TOP. None of the requirements for the resident management program will be changed; however, some sections are being moved to other sections of the 905 regulations or HUD handbooks.

C. Miscellaneous Conforming Changes

Changes that have been made to other parts are the exclusion from income of

stipends to RC officers and of training grants under the FIC program that would be added to 905 and 913; the provision for payments to duly elected resident council officers, and the inclusion of requirements governing the RMC Operating subsidy, budget, operating reserves, etc., that would be made to 990; and changes for the resident participation subpart that would be made in part 905 to parallel changes in part 964.

Other Matters

Justification for Shortened Comment Period

It is the general practice of the Department to provide a 60-day comment period on all proposed rules. However, the Department is shortening its usual 60-day comment period to 30 days because it would be contrary to the public interest to delay the benefits of the rule another 30 days and because it is unnecessary to have a longer comment period. The policies contained in this proposed rule are the result of collaborative efforts with various housing interest groups, i.e., public housing resident leaders, Public/Indian Housing Authorities, Public Housing Advocacy Groups. This should decrease the need for the usual time period for comment, since consultation took place while the policy was being developed.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this proposed rule does not have a significant economic impact on a substantial number of small entities. The proposed rule provides substantial revisions to the regulations concerning Tenant Participation and Management in Public Housing under which resident councils/resident management corporations receive funding on a competitive basis. HUD does not

anticipate a significant economic impact on small entities since resident councils/resident management corporations will continue to obtain by contract technical assistance to carry out program activities.

Environmental Impact

A finding of no significant impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the office of the Rules Docket Clerk at the above address.

Executive Order 12866

This proposed rule was reviewed by the Office of Management and Budget under Executive Order 12866, Regulatory Planning and Review. Any changes made to the proposed rule as a result of that review are clearly identified in the docket file which is available for public inspection in the office of the Department's Rules Docket Clerk, room 10276, 451 Seventh Street SW., Washington, DC.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this proposed rule will not have substantial direct effects on states or their political subdivisions, or the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. As a result, the proposed rule is not subject to review under the order. The revised proposed rule is consistent with federalism principles since it reduces unnecessary burdens on resident organizations. Since participation by resident

organizations is discretionary, this proposed rule lacks the direct and substantial effects on resident organizations required for a policy with federalism implications under the Order.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this proposed rule has a beneficial effect on the family, and thus, does not require further review. No significant change in existing HUD policies or programs will result from promulgation of this proposed rule, as those policies and programs relate to family concerns.

Regulatory Agenda

This proposed rule was listed as Item No. 1636 in the Department's Semiannual Agenda of Regulations published on October 25, 1993, (58 FR 56402, 56448) in accordance with Executive Order 12291 and the Regulatory Flexibility Act.

Public Reporting Burden

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). The Department has determined that the following provisions contain information collection requirements.

The Department has estimated the public reporting burden involved in the information collections contained in the proposed rule as shown below. The public reporting burden for each of these collections of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

INFORMATION COLLECTION BURDEN OF TOP RULE

Reference	No. of respondents	Freq. of responses	Est. avg. response time (hours)	Est. annual burden (hours)
964.18 & 905.964	1500	1	3	4500
964.115 & 964.130	1500	1	3	4500
964.215	200	1	2	400
964.225 (b) & 905.969	25	1	3	75
964.230, 964.305 & 905.982	500	1	1	500
964.310	500	1	8	4000
964.335	75	1	2	150
964.350, 964.350(a) & 905.988	75	1	1	75
Total Reporting Burden				14,200

INFORMATION COLLECTION BURDEN OF TOP RULE—Continued

Reference	No. of respondents	Freq. of responses	Est. avg. response time (hours)	Est. annual burden (hours)
Recordkeeping Burden: 964.230(a)(2) & 905.972	200		1	200
Total Recordkeeping Burden				200

The Catalog of Federal Domestic Assistance program number is 14.853.

List of Subjects

24 CFR Part 905

Aged, Energy conservation, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Lead poisoning, Loan programs—housing and community development, Loan programs—Indians, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 913

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 964

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 990

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, parts 905, 913, 964, and 990 of title 24 of the Code of Federal Regulations are proposed to be amended as follows:

PART 905—INDIAN HOUSING PROGRAMS

1. The authority citation for part 905 would be revised to read as follows:

Authority: 25 U.S.C. 450e(b); 42 U.S.C. 1437aa, 1437bb, 1437c, 1437cc, 1437d(c)(4)(D), 1437ee and 3535(d).

2. In § 905.102, the definition of *Annual income* would be amended by removing the word "or" from paragraph (2)(viii)(B); by adding the word "or" at the end of paragraph (2)(viii)(C); by adding a new paragraph (2)(viii)(D); by removing the word "or" from paragraph (2)(x); by designating paragraph (2)(xi) as paragraph (2)(xii); and by adding a new paragraph (2)(xi) to read as follows:

§ 905.102. Definitions.

* * * * *

Annual income.

* * * * *

(2) * * *

(viii) * * *

(D) A resident stipend, but only if the resident stipend does not exceed \$200 per month per officer to resident council officers. Stipends are intended to cover costs related to officers volunteer efforts and include but are not limited to the following items: child care, transportation, special equipment and special clothing.

* * * * *

(xi) The earnings and benefits to any resident resulting from the participation in a program providing employment training and supportive services in accordance with the Family Support Act of 1988, section 22 of the U.S. Housing Act of 1937, or any comparable Federal, State, Tribal or local law during the exclusion period. For purposes of this paragraph, the following definitions apply:

(A) *Comparable Federal, State, Tribal or Local law* means a program providing employment training and supportive services that—

(1) is authorized by a Federal, State, Tribal or local law;

(2) is funded by Federal, State, Tribal or local government;

(3) is operated or administered by a public agency; and

(4) has as its objective to assist participants in acquiring job skills.

(B) *Exclusion period* means the period during which the resident participates in a program described in this section, plus 18 months from the date the resident begins the first job acquired by the resident after completion of such program that is not funded by public housing assistance under the U.S. Housing Act of 1937 or the date the resident is terminated from employment without good cause. If the resident is terminated from employment without good cause, the exclusion period shall end.

(C) *Earnings and Benefits* means the incremental earnings and benefits

resulting from a qualifying job training program or subsequent job; or

* * * * *

3. In § 905.720, a new paragraph (f) would be added, to read as follows:

§ 905.720 Other costs.

* * * * *

(f) *Funding for Resident Organization Expenses.* In accordance with the provisions of 24 CFR part 905, subpart O and procedures determined by HUD, each HA with a duly elected resident organization shall include in the operating subsidy eligibility calculation, \$25 per unit per year (subject to appropriations) in support of the duly elected resident organization's activities.

* * * * *

4. Subpart O of part 905 would be revised to read as follows:

Subpart O—Resident Participation and Opportunities

General Provisions

Sec.

905.960 Purpose.

905.961 Applicability and scope.

905.962 Definitions.

905.963 HUD's role in activities under this subpart.

905.964 Resident participation requirements.

905.965 Funding Resident Participation.

Tenant Opportunities Program

905.966 General.

905.967 Eligible TOP Activities.

905.968 Technical assistance.

905.969 Resident management requirements.

905.970 Management specialist.

905.971 Operating subsidy, preparation of operating budget, operating reserves and retention of excess revenues.

905.972 TOP Audit and administrative requirements.

Family Investment Centers (FIC) Program

905.980 General.

905.982 Eligibility.

905.983 FIC Activities.

905.984 HA role in activities under this part.

905.985 HUD Policy on training, employment, contracting and subcontracting of Indian housing residents.

905.986 Grant set-aside assistance.

- 905.987 Resident compensation.
905.988 Administrative requirements.

Subpart O—Resident Participation and Opportunities

General Provisions

§ 905.960 Purpose.

The purpose of this subpart is to recognize the importance of involving residents in creating a positive living environment and in contributing to the successful operation of Indian housing.

§ 905.961 Applicability and scope.

(a) This subpart applies to any Indian housing authority (HA) that has an Annual Contributions Contract (ACC) with the Department. This subpart does not apply to housing assistance payments under section 8 of the U.S. Housing Act of 1937.

(b) This subpart contains HUD's policies, procedures, and requirements for the participation of Indian housing residents in Indian housing management.

(c) This subpart is designed to encourage increased tenant participation in Indian housing.

(d) This subpart is not intended to negate any pre-existing arrangements for resident management in Indian housing between a HA and a resident management corporation. On or after [insert effective date of the final rule], any new, renewed or renegotiated contracts must meet the requirements of this subpart, the ACC and all applicable laws and regulations.

(e) This subpart includes requirements for the Family Investment Centers (FIC) Program, which was established by Section 515 of the Cranston-Gonzalez National Affordable Housing Act, which created a new section 22 of the Act. The FIC program is designed to provide families living in Indian housing with better access to educational and employment opportunities.

§ 905.962 Definitions.

Family Investment Center. A Facility in or near Indian housing which provides families living in Indian housing with better access to educational and employment opportunities to achieve self sufficiency and independence.

Management. All activities for which the HA is responsible to HUD under the ACC, within the definition of "operation" under the Act and the ACC, including the development of resident programs and services.

Management contract. A written agreement between a resident management corporation and a HA, as provided by § 905.969. Project. For

purposes of this subpart, the term includes any of the following:

- (1) One or more contiguous buildings.
- (2) An area of contiguous row houses.
- (3) Scattered site buildings.
- (4) Scattered site single-family units.

Resident management. The performance of one or more management activities for one or more projects by a resident management corporation under a management contract with the HA.

Resident Management Corporation (RMC). A Resident Management Corporation is an entity that proposes to enter into, or enters into, a contract to manage HA property. The corporation must have each of the following characteristics:

(1) It must be a nonprofit organization that is incorporated under the laws of the State or Indian tribe in which it is located.

(2) It may be established by more than one resident organization, so long as each such organization both approves the establishment of the corporation and has representation on the Board of Directors of the corporation.

(3) It must have an elected Board of Directors.

(4) Its by-laws must require the Board of Directors to include representatives of each resident organization involved in establishing the corporation.

(5) Its voting members are required to be residents of the project or projects it manages.

(6) It must be approved by the resident organization. If there is no organization, a majority of the households of the project or projects must approve the establishment of such an organization.

Resident Organization (RO). A Resident Organization (or "Resident Council" as defined in section 20 of the Act) is an incorporated or unincorporated nonprofit organization or association that meets each of the following criteria:

(1) It must consist of residents only, and only residents may vote.

(2) If it represents residents in more than one development or in all of the developments of a HA, it must fairly represent residents from each development that it represents.

(3) It must adopt written procedures providing for the election of specific officers on a regular basis.

(4) It must have a democratically elected governing board. The voting membership of the board shall consist solely of the residents of the development or developments that the RO represents.

Resident participation. A process of consultation between residents and the

HA concerning matters affecting the management of Indian housing.

Resident-owned business. A Business staffed by residents that is related to the management of the IHA development(s).

§ 905.963 HUD's role in activities under this subpart.

(a) **General.** Subject to the requirements of this part and other requirements imposed on HAs by the ACC, statute or regulation, the form and extent of resident participation or resident management are local decisions to be made jointly by ROs and the HAs.

(b) **Duty to bargain in good faith.** If a HA refuses to negotiate with a RMC in good faith or, after negotiations, refuses to enter into a contract, the corporation may file an informal appeal with HUD, setting out the circumstances and providing copies of relevant materials evidencing the corporation's efforts to negotiate a contract. HUD shall require the HA to respond with a report stating the HA's reasons for rejecting the corporation's contract offer or for refusing to negotiate. Thereafter, HUD shall require the parties (with or without direct HUD participation) to undertake or to resume negotiations on a contract providing for resident management, and shall take such other actions as are necessary to resolve the conflicts between the parties. If no resolution is achieved within 90 days from the date HUD required the parties to undertake or resume such negotiations, HUD shall serve notice on both parties that administrative remedies have been exhausted (except that, pursuant to mutual agreement of the parties, the time for negotiations may be extended by no more than an additional 30 days).

§ 905.964 Resident participation requirements.

(a) **HA responsibilities.** (1) A HA must provide the residents or any resident organization with current information concerning the HA's policies on resident participation in management, including guidance on information and recognition of a RO, and, where appropriate, a RMC.

(2) A HA must consult with residents or resident organizations (if they exist), to determine the extent to which residents desire to participate in the management of their housing and the specific methods that may be mutually agreeable to the HA and the residents.

(3) When requested by residents, a HA must provide appropriate guidance to residents to assist them in establishing and maintaining a RO, and, where appropriate, a RMC.

(b) *Recognition.* A resident organization may request that it be recognized as the official organization representing the residents in meetings with the HA or with other entities.

(c) *Written understanding.* At a minimum, the HA and the RO shall put in writing their understanding concerning the elements of their relationship.

§ 905.965 Funding Resident Participation.

Funding will be provided under subpart J, for the following:

(a) *Resident Organizations.* Subject to appropriations, the HA shall provide funds to ROs for resident participation activities. Eligibility to receive operating subsidy for RO activities at \$25 per unit per year is a separate cost item under the Performance Funding System. Of this amount, \$15 per unit per year shall fund resident participation activities of the RO. Ten dollars per unit per year shall fund HA costs incurred in carrying out resident participation activities.

(b) *Stipends.* HAs may provide stipends to officers of the RO. The stipend, which may be up to \$200 per month per officer, shall be decided locally by the RO and HA. (See definition of annual income in § 905.102 for exclusion for these stipends.)

Tenant Opportunities Program

§ 905.966 General.

The Indian Tenant Opportunities Program (TOP) (which is the program similar to the public housing TOP for public housing residents) provides technical assistance for various activities including resident management for ROs/RMCs as authorized by Section 20 of the Act. The TOP provides opportunities for RO/RMCs to improve living conditions and resident satisfaction in Indian housing communities.

§ 905.967 Eligible TOP Activities.

Activities to be funded and carried out by an eligible resident council or resident management corporation, as defined in subpart B, must improve the living conditions and public housing operations and may include any combination of, but are not limited to, the following:

(a) *Resident Capacity Building.* (1) Training Board members in community organizing, Board development, and leadership training;

(2) Determining the feasibility of resident management enablement for a specific project or projects; and

(3) Assisting in the actual creation of an RMC, such as consulting and legal assistance to incorporate, preparing by-laws and drafting a corporate charter.

(b) Resident Management. (1)

Training residents, as potential employees of an RMC, in skills directly related to the operation, management, maintenance and financial systems of a project;

(2) Training of residents with respect to fair housing requirements; and

(3) Gaining assistance in negotiating management contracts, and designing a long-range planning system.

(c) Resident Management Business Development.

(1) Training related to resident-owned business development and technical assistance for job training and placement in RMC developments;

(2) Technical assistance and training in resident managed business development through:

- (i) Feasibility and market studies;
- (ii) Development of business plans;
- (iii) Outreach activities; and
- (iv) Innovative financing methods including revolving loan funds.

(3) Legal advice in establishing resident managed business entity.

(d) Social Support Needs (such as self-sufficiency and youth initiatives).

(1) Feasibility studies to determine training and social services needs;

(2) Training in management-related trade skills, computer skills, etc;

(3) Management-related employment training and counseling;

(4) Coordination of support services;

(5) Training for programs such as child care, early childhood development, parent involvement, volunteer services, parenting skills, before and after school programs; and

(6) Training programs on health, nutrition and safety.

(7) Training in the development of strategies to successfully implement a youth program. For example, assessing the needs and problems of the youth, improving youth initiatives that are currently active, and training youth, housing authority staff, resident management corporations and resident organizations on youth initiatives and program activities.

(8) Workshops for youth services, child abuse and neglect prevention, tutorial services, in partnership with community-based organizations such as local Boys and Girls Clubs, YMCA/YWCA, Boy/Girl Scouts, Campfire and Big Brother/Big Sisters, etc. Other HUD programs such as the Youth Sports Program and the Public Housing Drug Elimination Programs also provide funding in these areas; and

(e) *General.* (1) Required training on HUD regulations and policies governing the operation of low-income public and Indian housing, financial management, capacity building to develop the

necessary skills to assume management responsibilities at the development and property management;

(2) Purchasing hardware, i.e., computers and software, office furnishings and supplies, in connection with business development. Every effort must be made to acquire donated or discounted hardware;

(3) Training in accessing other funding sources; and

(4) Hiring trainers or other experts (RO/RMCs) must ensure that this training is provided by a qualified housing management specialist, a community organizer, the HA, or other sources knowledgeable about the program.

§ 905.968 Technical assistance.

To the extent that grant authority is available, HUD shall provide financial assistance to ROs or RMCs that obtain, by contract or otherwise, technical assistance for the development of resident management entities, including the formation of these entities; the development of the management capabilities of newly formed or existing entities; the identification of the social support needs of residents of projects, and the securing of this support; and a wide range of activities to further the purposes of this subpart.

§ 905.969 Resident management requirements.

The following requirements apply when a HA and its residents are interested in providing for resident performance of management functions in one or more projects under this subpart.

(a) *Resident management corporation.* Residents interested in contracting with a HA must establish a RMC that meets the requirements for such a corporation, as specified in this subpart.

(b) *Management Contract.* (1) A management contract between the HA and a RMC is required for resident management. The HA and the corporation may agree to the performance by the corporation of any or all management functions for which the HA is responsible to HUD under the ACC, and any other functions not inconsistent with the ACC and applicable laws and regulations. The management contract must be in conformance with the minimum requirements established by HUD.

(2) The management contract may include specific provisions governing management personnel; compensation for maintenance laborers and mechanics and administrative employees employed in the operation of the project, except that the amount of this compensation

must meet applicable labor standard requirements of Federal law; rent collection procedures; resident income verification; resident eligibility determinations; resident eviction; the acquisition of supplies and materials; and such other matters as the HA and the corporation determine to be appropriate, and as HUD may specify in administrative instructions.

(3) The management contract shall be treated as a contracting out of services, and must be subject to any provision of a collective bargaining agreement regarding the contracting out of services to which the HA is subject.

(4) Provisions on competitive bidding and requirements of prior written HUD approval of contracts contained in the ACC do not apply to the decision of a HA to contract with a RMC.

(c) *Prohibited activities.* A HA may not contract for assumption by the RMC of the HA's underlying responsibilities to HUD under the ACC.

(d) *Bonding and insurance.* Before assuming any management responsibility under its contract, the RMC must provide fidelity bonding and insurance, or equivalent protection that is adequate (as determined by HUD and the HA) to protect HUD and the HA against loss, theft, embezzlement, or fraudulent acts on the part of the corporation or its employees.

§ 905.970 Management specialist.

The RO must select, in consultation with the HA, a qualified Indian housing management specialist to assist in determining the feasibility of, and to help establish, a RMC and to provide training and other duties in connection with operating the TOP project. The Housing Management Specialist (Trainer) can be a non-profit organization, the HA or a consultant.

§ 905.971 Operating subsidy, preparation of operating budget, operating reserves and retention of excess revenues.

(a) *Calculation of operating subsidy.* Operating subsidy will be calculated separately for any project managed by a resident management corporation. This subsidy computation will be the same as the separate computation made for the balance of the projects in the HA in accordance with subpart J of this part, with the following exceptions: (1) The project managed by a resident management corporation will have an Allowable Expense Level based on the actual expenses for the project in the fiscal year immediately preceding management under this subpart. These expenditures will include the project's share of any expenses which are overhead or centralized HA

expenditures. The expenses must represent a normal year's expenditures for the project, and must exclude all expenditures which are not normal fiscal year expenditures as to amount or as to the purpose for which expended.

Documentation of this expense level must be presented with the project budget and approved by HUD. Any project expenditures funded from a source of income other than operating subsidies or income generated by the locally owned Indian housing program will be excluded from the subsidy calculation. For budget years after the first budget year under management by the resident management corporation, the Allowable Expense Level will be calculated as it is for all other projects, in accordance with subpart J of this part.

(2) The resident management corporation project will estimate dwelling rental income based on the rent roll of the project immediately preceding the assumption of management responsibility under this subpart, increased by the estimate of inflation of resident income used in calculating PFS subsidy.

(3) The resident management corporation will exclude, from its estimate of other income, any increased income directly generated by activities of the corporation or facilities operated by the corporation.

(4) Any reduction in the subsidy of a HA that occurs as a result of fraud, waste, or mismanagement by the HA shall not affect the subsidy calculation for the resident management corporation project.

(b) *Calculation of total income and preparation of operating budget.—No reduction.* (1) Subject to paragraph (c) of this section, the amount of funds provided by a HA to a project managed by a resident management corporation under this subpart may not be reduced during the three-year period beginning on the date a resident management corporation first assumes management responsibility for the project.

(2) *Treatment of technical assistance.* For purposes of determining the amount of funds provided to a project under paragraph (b)(1) of this section, the provision of technical assistance by the HA to the resident management corporation will not be included.

(3) *Operating budget.* The resident management corporation and the HA shall submit a separate operating budget, including the calculation of operating subsidy eligibility in accordance with paragraph (a) of this section, for the project managed by a resident management corporation to HUD for approval. This budget will reflect all project expenditures and will

identify which expenditures are related to the responsibilities of the resident management corporation and which are related to functions which will continue to be performed by the HA.

(4) *Operating reserves.* (i) Each project or part of a project that is operating in accordance with the ACC amendment relating to this subpart and in accordance with a contract vesting maintenance responsibilities in the resident management corporation will have transferred, into a sub-account of the operating reserve of the host HA, an operating reserve. Where all maintenance responsibilities for the resident-managed project are the responsibility of the corporation, the amount of the reserve made available to projects under this subpart will be the per unit cost amount available in the HA operating reserve, exclusive of all inventories, prepaids and receivables (at the end of the HA fiscal year preceding implementation), multiplied by the number of units in the project operated in accordance with the provisions of this subpart. Where some, but not all, maintenance responsibilities are vested in the resident management corporation, the contract may provide for an appropriately reduced portion of the operating reserve to be transferred into the corporation's sub-account.

(ii) The use of the reserve will be subject to all administrative procedures generally applicable to the Indian housing program. Any expenditure of funds from the reserve will be for eligible expenditures which are incorporated into an operating budget subject to approval by HUD.

(iii) Investment of funds held in the reserve will be in accordance with the provisions of chapter 4 of the Financial Management Handbook, 7475.1 REV, and interest generated will be included in the calculation of operating subsidy in accordance with subpart J of this part.

(c) *Adjustments to total income.* (1) Operating subsidy will reflect changes in inflation, utility rates and consumption, and changes in the number of units in the project.

(2) In addition to the amount of income derived from the project (from sources such as rents and charges) and the operating subsidy calculated in accordance with paragraph (a) of this section, the contract may specify that income be provided to the project from other sources of income of the HA.

(3) The following conditions may not affect the amounts to be provided to a project managed by a resident management corporation under this subpart:

(i) Any reduction in the total income of a HA that occurs as a result of fraud, waste, or mismanagement by the HA; or

(ii) Any change in the total income of a HA that occurs as a result of project-specific characteristics that are not shared by the project managed by the corporation under this subpart.

(d) *Retention of excess revenues.* Any income generated by a resident management corporation that exceeds the income estimated for the income category involved must be excluded in subsequent years in calculating: (1) The operating subsidy provided to a HA under subpart J of this part; and

(2) The funds provided by the HA to the resident management corporation.

(e) *Use of retained revenues.* Any revenues retained by a resident management corporation under paragraph (d) of this section may only be used for purposes of improving the maintenance and operation of the project, establishing business enterprises that employ residents of Indian housing, or acquiring additional dwelling units for low-income families. Units acquired by the resident management corporation will not be eligible for payment of operating subsidy.

§ 905.972 TOP Audit and administrative requirements.

(a) *Annual audit of books and records.* The financial statements of a RMC managing a project under this subpart must be audited annually by a licensed certified public accountant, designated by the RMC, in accordance with generally accepted government audit standards. A written report of each audit must be forwarded to HUD and the HA within 30 days of issuance.

(b) *Relationship to other authorities.* The requirements of paragraph (a) of this section are in addition to any other Federal law or other requirement that would apply to the availability and audit of books and records of RMCs under this part.

(c) *General administrative requirements.* Except as modified by this part, RMCs must comply with the requirements of OMB Circulars A-110 and A-122, as applicable.

Family Investment Centers (FIC) Program

§ 905.980 General.

(a) *The Family Investment Centers (FIC) Program.* This program provides families living in Indian housing with better access to educational and employment opportunities by:

(1) developing facilities in or near Indian housing for training and support services;

(2) mobilizing public and private resources to expand and improve the delivery of such services;

(3) providing funding for such essential training and support services that cannot otherwise be funded; and

(4) improving the capacity of management to assess the training and service needs of families, coordinating the provision of training and services that meet such needs, and ensuring the long-term provision of such training and services.

(b) *Supportive Services.* New or significantly expanded services essential to providing families in Indian housing with better access to educational and employment opportunities to achieve self-sufficiency and independence. HAs applying for funds to provide supportive services must demonstrate that the services will be provided at a higher level than currently provided. Supportive services may include:

(1) Child care;

(2) Employment training and counseling;

(3) Computer skills training;

(4) Education including remedial education; literacy training; completion of secondary or post secondary education and assistance in the attainment of certificates of high school equivalency;

(5) Business, entrepreneurial training and counseling;

(6) Transportation necessary to enable any participating family member to receive available services or to commute to his/her place of employment;

(7) Personal welfare (e.g. substance/alcohol abuse treatment and counseling, self-development counseling, etc.);

(8) Supportive Health Care Services (e.g., outreach and referral services; and

(9) Any other services and resources, including case management, determined to be appropriate in assisting eligible residents.

(c) *FIC Service Coordinator.* Any person who is responsible for:

(1) determining the eligibility and assessing needs of families to be serviced by the FIC;

(2) assessing training and service needs of eligible residents;

(3) working with service providers to coordinate the provision of services and to tailor the services to the needs and characteristics of eligible residents;

(4) mobilizing public and private resources to ensure that the supportive services identified can be funded over the five-year period, at least, following the initial receipt of funding;

(5) monitoring and evaluating the delivery, impact and effectiveness of any supportive service funded with

capital or operating assistance under the FIC program.

(6) coordinating the development and implementation of the FIC Program with other self-sufficiency, educational and employment programs; and

(7) performing other duties and functions that are appropriate for providing eligible residents with better access to educational and employment opportunities.

§ 905.982 Eligibility.

A HA may apply to establish one or more FICs for more than one Indian housing development. A HA must demonstrate a firm commitment of assistance from one or more sources ensuring that supportive services will be provided for not less than one year following the completion of activities.

§ 905.983 FIC Activities.

Activities that may be funded and carried out by an eligible HA may include: (a) The renovation, conversion, or combination of vacant dwelling units to create common areas to accommodate the provision of supportive services;

(b) The renovation of existing common areas to accommodate the provision of supportive services;

(c) The renovation of facilities located near the premises of one or more HA developments to accommodate the provision of supportive services;

(d) The provision of not more than 15 percent of the total cost of supportive services (which may be provided directly to eligible residents by the HA or by contract or lease through other appropriate agencies or providers), but only if the HA demonstrates that:

(1) The supportive services are appropriate to improve the access of eligible residents to employment and educational opportunities; and

(2) The HA has made diligent efforts to use or obtain other available resources to fund or provide such services; and

(e) The employment of service coordinators.

§ 905.984 HA role in activities under this part.

A HA shall develop a process that ensures that RO/RMC representatives and residents are fully informed of, and have an opportunity to comment on, the contents of the application and activities at all stages of the application and grant award process. The HA shall give full and fair consideration to the comments and concerns of the residents.

§ 905.985 HUD Policy on training, employment, contracting and subcontracting of Indian housing residents.

In accordance with section 3 of the Housing and Urban Development Act of 1968 and the implementing regulations at 24 CFR part 135, HAs, their contractors and subcontractors shall use best efforts, consistent with existing Federal, State, Tribal and local laws and regulations (including section 7(b) of the Indian Self-Determination and Education Assistance Act, to give low and very low-income persons the training and employment opportunities generated by section 3 covered assistance (as this term is defined in 24 CFR 135.7) to give section 3 business concerns the contracting opportunities generated by section 3 covered assistance.

§ 905.986 Grant set-aside assistance.

HUD may set-aside five percent of any amounts available in each fiscal year (subsequent to the first funding cycle) to supplement grants previously awarded under this program. These supplemental grants would be awarded to HAs that demonstrate that funds cannot otherwise be obtained and are needed to provide adequate service levels to residents.

§ 905.987 Resident compensation.

Residents employed pursuant to a FIC grant shall be paid at a rate not less than the highest of:

(a) The minimum wage that would be applicable to the employee under the Fair Labor Standards Act of 1938 (FLSA), if section 6(a)(1) of the FLSA applied to the resident and if the resident was not exempt under section 13 of the FLSA;

(b) The State, local or Tribal minimum wage for the most nearly comparable covered employment; or

(c) The prevailing rate of pay for persons employed in similar public occupations by the same employer.

§ 905.988 Administrative requirements.

Each HA receiving a grant shall submit to the HUD Field Office an annual progress report describing and evaluating the use of grant amounts received under this program.

PART 913—DEFINITION OF INCOME, INCOME LIMITS, RENT AND REEXAMINATION OF FAMILY INCOME FOR THE PUBLIC HOUSING PROGRAM

5. The authority citation for part 913 would continue to read as follows:

Authority: 42 U.S.C. 1437a, 1437d, 1437n and 3535(d).

6. In § 913.106, paragraph (c) would be amended by removing the word "or" from paragraph (c)(8)(ii); by adding the word "or" at the end of paragraph (c)(8)(iii); by adding a new paragraph (c)(8)(iv); by removing the word "or" from paragraph (c)(10); by redesignating paragraph (c)(11) as paragraph (c)(12); and by adding a new paragraph (c)(11), to read as follows:

§ 913.106 Annual income.

* * * * *

(c) * * *

(8) * * *

(iv) A resident service stipend, but only if the resident service stipend does not exceed \$200 per month/per officer to resident council officers. Stipends are intended to cover costs related to officer's volunteer efforts and include but are not limited to the following items: Child care, transportation, special equipment and special clothing.

* * * * *

(11) The earnings and benefits to any resident resulting from the participation in a program providing employment training and supportive services in accordance with the Family Support Act of 1988, section 22 of the U.S. Housing Act of 1937, or any comparable Federal, State, or local law during the exclusion period. For purposes of this paragraph, the following definitions apply.

(i) *Comparable Federal, State or Local law* means a program providing employment training and supportive services that—

(A) is authorized by a federal, state or local law;

(B) is funded by federal, state or local government;

(C) is operated or administered by a public agency; and

(D) has as its objective to assist participants in acquiring job skills.

(ii) *Exclusion period* means the period during which the resident participates in a program described in this section, plus 18 months from the date the resident begins the first job acquired by the resident after completion of such program that is not funded by public housing assistance under the U.S. Housing Act of 1937. If the resident is terminated from employment without good cause, the exclusion period shall end.

(iii) *Earnings and Benefits* means the incremental earnings and benefits resulting from a qualifying job training program or subsequent job;

* * * * *

7. Part 964, would be revised to read as follows:

PART 964—TENANT PARTICIPATION AND TENANT OPPORTUNITIES IN PUBLIC HOUSING

Subpart A—General Provisions

Sec.

964.1 Purpose.

964.3 Applicability and scope.

964.7 Definitions.

964.11 HUD policy on tenant participation.

964.12 HUD policy on the Tenant Opportunities Program (TOP).

964.14 HUD policy on partnerships.

964.15 HUD policy on resident management.

964.16 HUD role in activities under this rule.

964.18 HA role in activities under subpart B & C.

964.24 HUD policy on FIC Program.

Subpart B—Tenant Participation

964.100 Role of resident council.

964.105 Role of the Jurisdiction-Wide Resident Council.

964.110 Resident membership on HA board of Commissioners.

964.115 Resident council requirements.

964.117 Resident council partnerships.

964.120 Resident management corporation requirements.

964.125 Eligibility for resident council membership.

964.130 Election procedures and standards.

964.135 Resident Involvement in HA Management Operations.

964.140 Resident training.

964.145 Conflict of interest.

964.150 Funding tenant participation.

Subpart C—Tenant Opportunities Program

964.200 General.

964.205 Eligibility.

964.210 Announcement of Funding Availability.

964.215 Grant agreement.

964.220 Technical Assistance.

964.225 Resident management requirements.

964.230 Audit and administrative requirements.

Subpart D—Family Investment Centers (FIC) Program

964.300 General.

964.305 Eligibility.

964.308 Supportive services requirements.

964.310 Audit/Compliance Requirements.

964.315 HAs role in activities under this part.

964.320 HUD Policy on training, employment, contracting and subcontracting of public housing residents.

964.325 Announcement of funding availability.

964.330 Grant Set-Aside Assistance.

964.335 Grant agreement.

964.340 Resident compensation.

964.345 Treatment of income.

964.350 Administrative requirements.

Authority: 42 U.S.C. 1437d, 1437g, 1437i, 1437r, 1437t, 3535(d).

Subpart A—General Provisions**§ 964.1 Purpose.**

The purpose of this part is to recognize the importance of resident involvement in creating a positive living environment and in actively participating in the overall mission of public housing.

§ 964.3 Applicability and scope.

(a) The policies and procedures contained in this part apply to any HA that has a Public Housing Annual Contributions Contract (ACC) with HUD. This part does not apply to PHAs with housing assistance payments contracts with HUD under section 8 of the U. S. Housing Act of 1937.

(b) Subpart B of this part contains HUD policies, procedures, and requirements for the participation of residents in public housing operations. These policies, procedures, and requirements apply to all residents participating under this part.

(c)(1) Subpart C of this part contains HUD policies, procedures, and requirements for residents participating in the Tenant Opportunities Program (TOP) (replaces the Resident Management Program under section 20 of the United States Housing Act of 1937). Resident management in public housing is viable and remains an option under TOP.

(2) Subpart C of this part is not intended to negate any pre-existing arrangements for resident management in public housing between a PHA and a resident management corporation. On or after [insert effective date of this regulation], any new, renewed or renegotiated contracts must meet the requirements of this part, the ACC and all applicable laws and regulations.

(d) Subpart D of this part includes requirements for the Family Investment Centers (FIC) Program which was established by section 22 of the United States Housing Act of 1937 (42 U.S.C. 1437t) to provide families living in public housing and Indian housing with better access to educational and employment opportunities.

(e) The term "resident," as used throughout this part, is interchangeable with the term "tenant," to reflect the fact that local resident organizations have differing preferences for the terms. Terms such as "resident council" and "tenant council" and "resident management" and "tenant management" are interchangeable. Hereafter, for ease of discussion, the proposed rule will use the terms resident, resident council and resident management corporation, as appropriate.

§ 964.7 Definitions.

Annual Contributions Contract (ACC). A contract (in the form prescribed by HUD) under which HUD agrees to provide financial assistance, and the HA agrees to comply with HUD requirements for the development and operation of the public housing project.

Eligible Residents for FIC. A participating resident of a participating HA. If the HA is combining FIC with the Family Self-Sufficiency (FSS) program, the term also means Public Housing FSS and Section 8 families participating in the FSS program. Although Section 8 FSS families are eligible residents for FIC, they do not qualify for income exclusions that are provided for public housing residents participating in employment and supportive service programs.

Family Investment Centers (FIC). A facility on or near public housing which provides families living in public housing with better access to educational and employment opportunities to achieve self-sufficiency and independence.

FIC Service Coordinator. Any person who is responsible for:

(1) Determining the eligibility and assessing needs of families to be served by the FIC;

(2) Assessing training and service needs of eligible residents;

(3) Working with service providers to coordinate the provision of services on a HA-wide or less than HA-wide basis, and to tailor the services to the needs and characteristics of eligible residents;

(4) Mobilizing public and private resources to ensure that the supportive services identified can be funded over the five-year period, at least, following the initial receipt of funding.

(5) Monitoring and evaluating the delivery, impact, and effectiveness of any supportive service funded with capital or operating assistance under FIC program;

(6) Coordinating the development and implementation of the FIC program with other self-sufficiency programs, and other education and employment programs; and

(7) Performing other duties and functions that are appropriate for providing eligible residents with better access to educational and employment opportunities.

Management. All activities for which the HA is responsible to HUD under the ACC, within the definition of "operation" under the Act and the ACC, including the development of resident programs and services.

Management contract. A written agreement between a resident

management corporation and a HA, as provided by subpart C.

Public Housing Agency (HA). Any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development and operation of low-income housing.

Public Housing Development (Development). Any conventional housing project that is owned and operated by a HA, including the authorities of Guam, Puerto Rico, Alaska and the Virgin Islands, for which it receives operating subsidy from HUD under the Performance Funding System (PFS) to engage in the operation of low-income housing.

Resident Management. The performance of one or more management activities for one or more projects by a resident management corporation under a management contract with the HA.

Resident Management Corporation. An entity that proposes to enter into, or enters into, a contract to manage one or more management activities of a HA.

Resident-owned business. A Business staffed by residents that is related to the management of the HA development(s).

Supportive Services for FIC. New or significantly expanded services that are essential to providing families living with children in public housing with better access to educational and employment opportunities to achieve self-sufficiency and independence.

Tenant Opportunities Program (TOP). The TOP program is designed to prepare residents to experience the dignity of meaningful work, to own and operate resident businesses, to move toward financial independence, and to enable them to choose where they want to live and engage in meaningful participation in the management of housing developments in which they live. Financial assistance in the form of technical assistance grants are available to RCs/RMCs to prepare to manage activities in their public housing developments. TOP will include components such as economic development, self-sufficiency initiatives, and social services for public housing residents.

Vacant Unit under FIC. A dwelling unit that is not under an effective lease to an eligible family. An effective lease is a lease under which an eligible family has a right to possession of the unit and is being charged rent, even if the amount of any utility allowance equals or exceeds the amount of a total resident payment that is based on income and, as a result, the amount paid by the family to the HA is zero.

§ 964.11 HUD policy on tenant participation.

HUD promotes resident participation and the active involvement of residents in all aspects of a HA's overall mission and operation. Residents have a right to organize and elect a resident council to represent their interests. As long as proper procedures are followed, the HA shall recognize the duly elected resident council to participate fully through a working relationship with the HA. HUD encourages HAs and residents to work together to determine the most appropriate ways to foster constructive relationships, particularly through duly elected resident organizations.

§ 964.12 HUD policy on the Tenant Opportunities Program (TOP).

HUD promotes TOP programs to support activities that enable residents to improve the quality of life and resident satisfaction, and obtain other social and economic benefits for residents and their families. Tenant opportunity programs are proven to be effective in facilitating economic uplift, as well as in improving the overall conditions of the public housing communities.

§ 964.14 HUD policy on partnerships.

HUD promotes partnerships between residents and HAs which are an essential component to building, strengthening and improving public housing. Strong partnerships are critical for creating positive changes in lifestyles thus improving the quality of life for public housing residents, and the surrounding community.

§ 964.15 HUD policy on resident management.

It is HUD's policy to encourage resident management. HUD encourages HAs, resident councils and resident management corporations to explore the various functions involved in management to identify appropriate opportunities for contracting with a resident management corporation. Potential benefits of resident-managed entities include improved quality of life, experiencing the dignity of meaningful work, enabling residents to choose where they want to live, and meaningful participation in the management of the housing development.

§ 964.16 HUD role in activities under this rule.

(a) *General.* Subject to the requirements of this part and other requirements imposed on HAs by the ACC, statute or regulation, the form and extent of resident participation including resident management are local decisions to be made jointly by

resident councils/resident management corporations and their HAs. HUD will promote tenant participation and tenant opportunities programs, and will provide additional guidance, as necessary and appropriate. In addition, HUD will endeavor to provide technical assistance in connection with these initiatives.

(b) *Monitoring.* HUD shall ensure that the requirements under this rule are operating efficiently and effectively.

§ 964.18 HA role in activities under subparts B & C.

(a) *HAs with 100 units or more.* (1) A HA shall officially recognize a duly elected resident council as the sole representative of the residents it purports to represent, and support its tenant participation activities.

(2) When requested by residents, a HA shall provide appropriate guidance to residents to assist them in establishing and maintaining a resident council.

(3) A HA may consult with residents, or resident councils (if they exist), to determine the extent to which residents desire to participate in activities involving their community, including the management of specific functions of a public housing development that may be mutually agreeable to the HA and the resident council/resident management corporation.

(4) A HA shall provide the residents or any resident council with current information concerning the HA's policies on tenant participation in management.

(5) If requested, a HA shall provide a duly recognized resident council office space and meeting facilities, free of charge, preferably within the development it represents.

(6) If requested, a HA shall negotiate with the duly elected resident council on all uses of community space for meetings, recreation and social services and other resident participation activities pursuant to HUD guidelines. Such agreements shall be put into a written document to be signed by the HA and the resident council. If a HA fails to negotiate with a resident council in good faith or, after negotiations, refuses to permit such usage of community space, the resident council may file an informal appeal with HUD, setting out the circumstances and providing copies of relevant materials evidencing the resident council's efforts to negotiate a written agreement. HUD shall require the HA to respond with a report stating the HA's reasons for rejecting the request or for refusing to negotiate. HUD shall require the parties (with or without direct HUD participation) to undertake or to resume

negotiations on an agreement. HUD shall take other actions as are necessary to resolve the conflicts between the parties.

(7) In no event shall HUD or a HA recognize a competing resident council once a duly elected resident council has been established. Any funding of resident activities and resident input into decisions concerning public housing operations shall be made only through the officially recognized resident council.

(8) The HA shall ensure open communication and frequent meetings between HA management and resident councils and shall encourage the formation of joint HA management-resident committees to work on issues and planning.

(9) The resident council shall hold frequent meetings with the residents to ensure that residents have input, and are aware and actively involved in HA management-resident council decisions and activities.

(10) The HA and resident council shall put in writing in the form of a Memorandum of Understanding the elements of their partnership agreement and it shall be updated at least once every three (3) years.

(11) The HA, in collaboration with the resident councils, shall assume the lead role for assuring maximum opportunities for skills training for public housing residents. To the extent possible, the training resources should be local to ensure maximum benefit and on-going access.

(b) *HAs with fewer than 100 units.* (1) HAs with fewer than 100 units of public housing have the option of participating in programs under this rule.

(2) HAs shall not deny residents the opportunity to organize. If the residents decide to organize and form a resident council, the HA shall comply with the following:

(i) A HA shall officially recognize a duly elected resident council as the sole representative of the residents it purports to represent, and support its tenant participation activities.

(ii) When requested by residents, a HA shall provide appropriate guidance to residents to assist them in establishing and maintaining a resident council.

(iii) A HA shall provide the residents or any resident council with current information concerning the HA's policies on tenant participation in management.

(iv) In no event shall HUD or a HA officially recognize a competing resident council once a duly elected resident council has been established. If a duly elected resident council has been

formed, any input into changes concerning public housing operations shall be made only through the officially recognized resident council.

§ 964.24 HUD policy on FIC Program.

HUD promotes Family Investment Centers which provide better access to educational and employment opportunities for residents living in public housing. HUD encourages resident involvement in the FIC Program and promotes resident-HA partnerships to achieve mutual goals.

Subpart B—Tenant Participation

§ 964.100 Role of resident council.

The role of a resident council is to improve the quality of life and resident satisfaction and participate in self-help initiatives to enable residents to create a positive living environment for families living in public housing. Resident councils may actively participate through a working partnership with the HA to advise and assist in all aspects of public housing operations.

§ 964.105 Role of the Jurisdiction-Wide Resident Council.

(a) *Jurisdiction-Wide Resident Council.* Resident councils may come together to form an organization which can represent the interest of residents residing in units under a HA's jurisdiction. This can be accomplished by the presidents of duly elected resident councils forming an organization, by resident councils electing a representative to the organization, or through jurisdiction-wide elections. If duly elected resident councils form such an organization, the HA shall recognize it as the voice of authority-wide residents for input into housing authority policy making.

(b) *Function.* The jurisdiction-wide council may advise the Board of Commissioners and executive director in all areas of HA operations, including but not limited to occupancy, general management, maintenance, security, resident training, resident employment, social services and modernization priorities.

(c) *Cooperation with other groups.* There shall be regularly scheduled meetings between the HA and the local duly elected resident council, and the jurisdiction-wide resident council to discuss problems, plan activities and review progress.

§ 964.110 Resident membership on HA Board of Commissioners.

HUD encourages to the maximum extent possible resident membership on HA Board of Commissioners, for the

purpose of having maximum input into HA policy and decision-making on matters concerning public housing.

§ 964.115 Resident council requirements.

A resident council shall consist of residents residing in public housing and must meet each of the following requirements in order to receive official recognition from the HA/HUD, and be eligible to receive funds for resident council activities, and stipends for their related costs for volunteer work in public housing: (a) It may represent residents residing in scattered site buildings, in areas of contiguous row houses; or in one or more contiguous buildings; in a development; or in a combination of these buildings or developments;

(b) It must adopt written procedures such as by-laws, or a constitution which provides for the election of residents to the governing board by the voting membership of the residents residing in public housing, described in paragraph (b) of this section, on a regular basis but at least once every three (3) years. The written procedures must provide for the recall of the resident board by approval of at least 51 percent of the voting membership; and

(c) It must have a democratically elected governing board that is elected by the voting membership. The voting membership must consist of residents at least 18 years of age and whose name appears on a lease for the unit in the public housing that the resident council represents.

§ 964.117 Resident council partnerships.

A resident council may form partnerships with outside organizations, provided that such relationships are complementary to the resident council in its duty to represent the residents, and provided that such outside organizations do not become the governing entity of the resident council.

§ 964.120 Resident management corporation requirements.

A resident management corporation must consist of residents residing in public housing and have each of the following characteristics in order to receive official recognition by the HA and HUD: (a) It shall be a non-profit organization that is validly incorporated under the laws of the State in which it is located;

(b) It may be established by more than one resident council, so long as each such council:

- (1) Approves the establishment of the corporation, and
- (2) Has representation on the Board of Directors of the corporation;

(c) It shall have an elected Board of Directors, and elections must be held at least once every three (3) years;

(d) Its by-laws shall require the Board of Directors to include resident representatives of each resident council involved in establishing the corporation;

(e) Its voting members shall be residents at least 18 years of age and whose name appears on the lease of a unit in the public housing represented by the resident management corporation;

(f) Where a resident council already exists for the development, or a portion of the development, the resident management corporation shall be approved by the resident council board and a majority of the residents. If there is no resident council, a majority of the residents of the public housing development it will represent must approve the establishment of such a corporation for the purposes of managing the project; and

(g) It may serve as both the resident management corporation and the resident council, so long as the corporation meets the requirements of this part for a resident council.

§ 964.125 Eligibility for resident council membership.

(a) Any member of a public housing household who is on the lease of a unit in the public housing development and meets the requirements of the by-laws is eligible to be a member of a resident council. The resident council may establish additional criteria that are non-discriminatory and do not infringe on rights of other residents in the development. Such criteria must be stated in the by-laws or constitution as appropriate.

(b) The right to vote for resident council board shall be limited to designated heads of households and other members of the household who are 18 years or older whose name appears on the lease of a unit in the public housing development represented by the resident council.

(c) Any qualified voting member of a resident council who meets the requirements described in the by-laws and is in compliance with the lease may seek office and serve on the resident council governing board.

§ 964.130 Election procedures and standards.

At a minimum, a resident council may use local election boards/commissions or if none exists, or is unwilling, an independent third-party to oversee elections and recall procedures.

(a) Resident councils shall adhere to the following minimum standards regarding election procedures:

(1) All procedures must assure fair and frequent elections of resident council members—at least once every three years for each member.

(2) Staggered terms for resident council governing board members and term limits shall be discretionary with the resident council.

(3) Each resident council shall adopt and issue election and recall procedures in their by-laws.

(4) The election procedures shall include qualifications to run for office, frequency of elections, procedures for recall, and term limits if desired.

(5) Sufficient notice of nomination and election, minimally 30 days, describing election procedures, eligibility requirements and dates of nominations/elections must be given to all voting members prior to the date of the nominations/elections.

(b) If a resident council fails to satisfy HUD minimum standards for fair and frequent elections, or fails to follow its own election procedures as adopted, HUD shall require the HA to withdraw recognition of the resident council and to withhold resident services funds as well as funds provided in conjunction with services rendered for resident participation in public housing.

(c) HAs shall monitor the resident council election process and shall establish a procedure to appeal any adverse decision relating to failure to satisfy HUD minimum standards. Such appeal shall be submitted to a jointly selected third-party arbitrator at the local level. If costs are incurred by using a third-party arbitrator, then such costs should be paid from the HAs resident services funds pursuant to § 964.150.

§ 964.135 Resident involvement in HA management operations.

Residents shall be involved and participate in the overall policy development and direction of Public Housing operations.

(a) Resident management corporations (RMCs) may contract with HAs to perform one or more management functions provided the resident entity has received sufficient training and/or has staff with the necessary expertise to perform the management functions and provided the RMC meets bonding and licensing requirements.

(b) Residents shall be actively involved in a HA's decision-making process and give advice on matters such as modernization, security, maintenance, resident screening and selection, and recreation.

(c) While a HA has responsibility for management operations, it shall ensure strong resident participation in all issues and facets of its operations through the duly elected resident councils at public housing developments, and with jurisdiction-wide resident councils.

(d) A HA shall work in partnership with the duly elected resident councils.

(e) HAs, upon request from the duly elected resident council, shall ensure that the duly elected resident council officers as defined in subpart B of this rule, and other residents in the development are fully trained and involved in developing and implementing Federal programs including but not limited to Comprehensive Improvement Assistance Program (CIAP), Comprehensive Grant Program, Urban Revitalization Demonstration, Drug Elimination, and FIC.

(f) HAs shall involve resident council officers and other interested residents at the development through education and direct participation in all phases of the budgetary process.

(g) Resident council officers shall be encouraged to become involved in the resident screening and selection process for prospective residents at the development. Those selected to perform resident screening and selection functions must be trained by the HA in resident screening and selection and must sign a legal document committing to confidentiality.

§ 964.140 Resident training.

(a) *Resident training opportunities.* HUD encourages a partnership between the residents, the HA and HUD, as well as with the public and non-profit sectors to provide training opportunities for public housing residents. The categories in which training could occur include, but are not limited to:

(1) Community organization and leadership training;

(2) Organizational development training for Resident Management Corporations and duly elected Resident Councils;

(3) Public housing policies, programs, rights and responsibilities training; and

(4) Business entrepreneurial training, planning and job skills.

(b) *Local training resources.* HUD encourages the use of local training resources to ensure the ongoing accessibility and availability of persons to provide training and technical assistance. Possible training resources may include:

(1) Resident organizations;

(2) Housing authorities;

(3) Local community colleges, vocational schools; and

(4) HUD and other Federal agencies and other local public, private and non-profit organizations.

§ 964.145 Conflict of interest.

Resident council officers cannot serve as contractors or employees at the HA.

§ 964.150 Funding tenant participation.

(a) *Funding duly elected resident councils.* (1) The HA shall provide funds it receives for this purpose to the duly elected resident council to use for resident participation activities. This shall be an add-on to the Performance Funding System (PFS), as provided by 24 CFR part 990, to permit HAs to fund \$25 per unit per year for resident services, subject to the availability of appropriations. Of this amount, \$15 per unit per year would be provided to fund appropriate activities for duly elected resident councils, and \$10 per unit per year would be used by the HA to pay for costs incurred in carrying out tenant participation activities under subpart B of this rule, including the expenses for an arbitrator required under subpart B § 964.130. This will guarantee the resources necessary to create a bonafide partnership among the duly elected resident council, the HA and HUD.

(2) A duly elected resident council shall receive tenant services funding regardless of the HA's financial status. The resident council funds shall not be impacted or restricted by the HA financial status and all said funds must be used for the purpose set forth in subparts B & C under this rule.

(b) *Stipends.* (1) HUD encourages HAs to provide stipends to resident council officers who serve as volunteers in their public housing developments. The amount of the stipend, up to \$200 per month/per officer, shall be decided locally by the resident council and the HA. Pursuant to § 913.106, stipends are excluded from income for rent purposes.

(2) Stipends are not to be construed as salaries and should not be included as income for calculation of rents, and are not subject to conflict of interest requirements.

(3) Funding provided by a HA to a duly elected resident council may be made only under a written agreement between the HA and a resident council, which includes a resident council budget and assurance that all resident council expenditures will not contravene provisions of law and will promote serviceability, efficiency, economy and stability in the operation of the local development. The agreement must require the local resident council to account to the HA for the use of the funds and permit the

HA to inspect and audit the resident council's financial records related to the agreement.

Subpart C—Tenant Opportunities Program

§ 964.200 General.

(a) The Tenant Opportunities Program (TOP) provides technical assistance for various activities including resident management for resident councils/ resident management corporations as authorized by section 20 of the U.S. Housing Act of 1937. The TOP provides opportunities for resident organizations to improve living conditions and resident satisfaction in public housing communities.

(b) This subpart establishes the policies, procedures and requirements for participating in the TOP with respect to applications for funding for programs identified in this subpart.

(c) This subpart contains the policies, procedures and requirements for the resident management program as authorized by section 20 of the U.S. Housing Act of 1937.

§ 964.205 Eligibility.

(a) *Resident councils/resident management corporations.* Any eligible resident council/resident management corporation as defined in subpart B is eligible to participate in a program administered under this subpart.

(b) *Activities.* Activities to be funded and carried out by an eligible resident council or resident management corporation, as defined in subpart B, must improve the living conditions and public housing operations and may include any combination of, but are not limited to, the following: (1) *Resident Capacity Building.* (i) Training Board members in community organizing, Board development, and leadership training;

(ii) Determining the feasibility of resident management enablement for a specific project or projects; and

(iii) Assisting in the actual creation of an RMC, such as consulting and legal assistance to incorporate, preparing by-laws and drafting a corporate charter.

(2) *Resident Management.* (i) Training residents, as potential employees of an RMC, in skills directly related to the operation, management, maintenance and financial systems of a project;

(ii) Training of residents with respect to fair housing requirements; and

(iii) Gaining assistance in negotiating management contracts, and designing a long-range planning system.

(3) *Resident Management Business Development.* (i) Training related to resident-owned business development

and technical assistance for job training and placement in RMC developments;

(ii) Technical assistance and training in resident managed business development through:

(A) Feasibility and market studies; (B) Development of business plans; (C) Outreach activities; and (D) Innovative financing methods

including revolving loan funds; and (iii) Legal advice in establishing resident managed business entity.

(4) *Social Support Needs (such as self-sufficiency and youth initiatives).* (i) Feasibility studies to determine training and social services needs;

(ii) Training in management-related trade skills, computer skills, etc.;

(iii) Management-related employment training and counseling;

(iv) Coordination of support services;

(v) Training for programs such as child care, early childhood development, parent involvement, volunteer services, parenting skills, before and after school programs;

(vi) Training programs on health, nutrition and safety;

(vii) Workshops for youth services, child abuse and neglect prevention, tutorial services, in partnership with community-based organizations such as local Boys and Girls Clubs, YMCA/ YWCA, Boy/Girl Scouts, Campfire and Big Brother/Big Sisters, etc. Other HUD programs such as the Youth Sports Program and the Public Housing Drug Elimination Programs also provide funding in these areas; and

(viii) Training in the development of strategies to successfully implement a youth program. For example, assessing the needs and problems of the youth, improving youth initiatives that are currently active, and training youth, housing authority staff, resident management corporations and resident councils on youth initiatives and program activities.

(5) *General.* (i) Required training on HUD regulations and policies governing the operation of low-income public housing, financial management, capacity building to develop the necessary skills to assume management responsibilities at the project and property management;

(ii) Purchasing hardware, i.e., computers and software, office furnishings and supplies, in connection with business development. Every effort must be made to acquire donated or discounted hardware;

(iii) Training in accessing other funding sources; and

(iv) Hiring trainers or other experts (RCs/RMCs must ensure that this training is provided by a qualified housing management specialist, a

community organizer, the HA, or other sources knowledgeable about the program).

§ 964.210 Announcement of funding availability.

A Notice of Funding Availability shall be published periodically in the **Federal Register** containing the amounts of funds available, funding criteria, where to obtain and submit applications, the deadline for submissions, and further explanation of the selection criteria.

§ 964.215 Grant agreement.

(a) *General.* HUD shall enter into a grant agreement with the recipient of a technical assistance grant which defines the legal framework for the relationship between HUD and a resident council or resident management corporation for the proposed funding.

(b) *Term of grant agreement.* A grant shall be for a term of three to five years (3–5 years), and renewable at the expiration of the term.

§ 964.220 Technical assistance.

(a) *Financial assistance.* HUD will provide financial assistance, to the extent available, to resident councils or resident management corporations for technical assistance and training to further the activities under this subpart.

(b) *Requirements for a management specialist.* If a resident council or resident management corporation seeks to manage a development, it must select, in consultation with the HA, a qualified housing management specialist to assist in determining the feasibility of, and to help establish, a resident management corporation and to provide training and other duties in connection with the daily operations of the project.

§ 964.225 Resident management requirements.

The following requirements apply when a HA and its residents are interested in providing for resident performance of several management functions in one or more projects.

(a) *Resident management corporation.* Resident councils interested in contracting with a HA must establish a resident management corporation that meets the requirements for such a corporation, as specified in subpart B. The RMC and its employees must demonstrate their ability and skill to perform in the particular areas of management pursuant to the management contract.

(b) *HA responsibilities.* HAs shall give full and serious consideration to resident management corporations seeking to enter into a management contract with the HA. A HA shall enter into good-faith negotiations with a

corporation seeking to contract to provide management services.

(c) *Duty to bargain in good faith.* If a HA refuses to negotiate with a resident management corporation in good faith or, after negotiations, refuses to enter into a contract, the corporation may file an informal appeal with HUD, setting out the circumstances and providing copies of relevant materials evidencing the corporation's efforts to negotiate a contract. HUD shall require the HA to respond with a report stating the HA's reasons for rejecting the corporation's contract offer or for refusing to negotiate. Thereafter, HUD shall require the parties (with or without the direct HUD participation) to undertake or to resume negotiations on a contract providing for resident management, and shall take such other actions as are necessary to resolve the conflicts between the parties. If no resolution is achieved within 90 days from the date HUD required the parties to undertake or resume such negotiations, HUD shall serve notice on both parties that administrative remedies have been exhausted (except that, pursuant to mutual agreement of the parties, the time for negotiations may be extended by no more than an additional 30 days).

(d) *Management contract.* A management contract between the HA and a resident management corporation is required for property management. The HA and the resident management corporation may agree to the performance by the corporation of any or all management functions for which the HA is responsible to HUD under the ACC and any other functions not inconsistent with the ACC and applicable state and local laws, regulations and licensing requirements.

(e) *Procurement requirements.* The management contract shall be treated as a contracting out of services, and must be subject to any provision of a collective bargaining agreement regarding the contracting out of services to which the HA is subject. Provisions on competitive bidding and requirements of prior written HUD approval of contracts contained in the ACC do not apply to the decision of a HA to contract with a RMC.

(f) *Prohibited activities.* A HA may not contract for assumption by the resident management corporation of the HA's underlying responsibilities to HUD under the ACC.

(g) *Bonding and insurance.* Before assuming any management responsibility under its contract, the RMC must provide fidelity bonding and insurance, or equivalent protection that is adequate (as determined by HUD and the HA) to protect HUD and the HA

against loss, theft, embezzlement, or fraudulent acts on the part of the resident management corporation or its employees.

(h) *Waiver of HUD requirements.* Upon the joint request of a resident management corporation and the HA, HUD may waive any requirement that HUD has established and that is not required by law, if HUD determines, after consultation with the resident management corporation and the HA, that the requirement unnecessarily increases the costs to the project or restricts the income of the project; and that the waiver would be consistent with the management contract and any applicable collective bargaining agreement. Any waiver granted to a resident management corporation under this section will apply as well to the HA to the extent the waiver affects the HA's remaining responsibilities relating to the resident management corporation's project.

§ 964.230 Audit and administrative requirements.

(a) *TOP grant recipients.* The HUD Inspector General, the Comptroller General of the United States, or any duly authorized representative shall have access to all records required to be retained by this subpart or by any agreement with HUD for the purpose of audit or other examinations.

(1) Grant recipients must comply with the requirements of OMB Circulars A-110 and A-122, as applicable.

(2) A final audit shall be required for the activities and expenditures made pursuant to this subpart by a Certified Public Accountant (CPA), in accordance with generally accepted government audit standards. A written report of the audit must be forwarded to HUD within 60 days of issuance.

(b) *Resident management corporations.* Resident management corporations who have entered into a contract with a HA with respect to management of a development(s) must comply with the requirements of OMB Circulars A-110 and A-122, as applicable. Resident management corporations managing a development(s) must be audited annually by a licensed certified public accountant, designated by the corporation, in accordance with generally accepted government audit standards.

Subpart D—Family Investment Centers (FIC) Program

§ 964.300 General.

The Family Investment Centers Program provides families living in public housing with better access to

educational and employment opportunities by:

(a) Developing facilities in or near public housing for training and support services;

(b) Mobilizing public and private resources to expand and improve the delivery of such services;

(c) Providing funding for such essential training and support services that cannot otherwise be funded; and

(d) Improving the capacity of management to assess the training and service needs of families, coordinate the provision of training and services that meet such needs, and ensure the long-term provision of such training and services. FIC provides funding to HAs to access educational, housing, or other social service programs to assist public housing residents toward self-sufficiency.

§ 964.305 Eligibility.

(a) *Public Housing Authorities.* HAs may apply to establish one or more FICs for more than one public housing development.

(b) *FIC Activities.* Activities that may be funded and carried out by eligible HAs, as defined in 964.305(a) and 964.310 (a) may include:

(1) The renovation, conversion, or combination of vacant dwelling units in a HA development to create common areas to accommodate the provision of supportive services;

(2) The renovation of existing common areas in a HA development to accommodate the provision of supportive services;

(3) The renovation of facilities located near the premises of one or more HA developments to accommodate the provision of supportive services;

(4) The provision of not more than 15 percent of the total cost of supportive services (which may be provided directly to eligible residents by the HA or by contract or lease through other appropriate agencies or providers), but only if the HA demonstrates that:

(i) The supportive services are appropriate to improve the access of eligible residents to employment and educational opportunities; and

(ii) The HA has made diligent efforts to use or obtain other available resources to fund or provide such services; and

(5) The employment of service coordinators.

(c) *Follow up.* A HA must demonstrate a firm commitment of assistance from one or more sources ensuring that supportive services will be provided for not less than one year following the completion of activities.

(d) *Environmental Review.* Any environmental impact regarding eligible

activities will be addressed through an environmental review of that activity as required by 24 CFR part 50, including the applicable related laws and authorities under section 50.4, to be completed by HUD, to ensure that any environmental impact will be addressed before assistance is provided to the HA. Grantees will be expected to adhere to all assurances applicable to environmental concerns.

§ 964.308 Supportive services requirements.

HAs shall provide new or significantly expanded services essential to providing families in public housing with better access to educational and employment opportunities to achieve self-sufficiency and independence. HAs applying for funds to provide supportive services must demonstrate that the services will be provided at a higher level than currently provided. Supportive services may include:

(a) Child care, of a type that provides sufficient hours of operation and serves appropriate ages as needed to facilitate parental access to education and job opportunities;

(b) Employment training and counseling (e.g., job training, preparation and counseling, job development and placement, and follow-up assistance after job placement);

(c) Computer skills training;

(d) Education (e.g., remedial education, literacy training, completion of secondary or post-secondary education, and assistance in the attainment of certificates of high school equivalency);

(e) Business entrepreneurial training and counseling;

(f) Transportation, as necessary to enable any participating family member to receive available services or to commute to his or her place of employment;

(g) Personal welfare (e.g., substance/alcohol abuse treatment and counseling, self-development counseling, etc.);

(h) Supportive Health Care Services (e.g., outreach and referral services; and

(i) Any other services and resources, including case management, that are determined to be appropriate in assisting eligible residents.

§ 964.310 Audit/Compliance Requirements.

HAs cannot have serious unaddressed, outstanding Inspector General audit findings or fair housing and equal opportunity monitoring review findings or Field Office management review findings. In

addition, the HA must be in compliance with civil rights laws and equal opportunity requirements. A HA will be considered to be in compliance if:

(a) As a result of formal administrative proceedings, there are no outstanding findings of noncompliance with civil rights laws unless the HA is operating in compliance with HUD-approved compliance agreement designed to correct the area(s) of noncompliance;

(b) There is no adjudication of a civil rights violation in a civil action brought against it by a private individual, unless the HA demonstrates that it is operating in compliance with a court order, or implementing a HUD-approved resident selection and assignment plan or compliance agreement, designed to correct the area(s) of noncompliance;

(c) There is no deferral of Federal funding based upon civil rights violations;

(d) HUD has not deferred application processing by HUD under Title VI of the Civil Rights Act of 1964, the Attorney General's Guidelines (28 CFR 50.3) and HUD's Title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1) [HAs only] or under Section 504 of the Rehabilitation Act of 1973 and HUD regulations (24 CFR 8.57) [HAs and IHAs];

(e) There is no pending civil rights suit brought against the HA by the Department of Justice; and

(f) There is no unresolved charge of discrimination against the HA issued by the Secretary under Section 810(g) of the Fair Housing Act, as implemented by 24 CFR 103.400.

§ 964.315 HAs role in activities under this part.

The HAs shall develop a process that assures that RC/RMC representatives and residents are fully briefed and have an opportunity to comment on the proposed content of the HA's application for funding. The HA shall give full and fair consideration to the comments and concerns of the residents. The process shall include:

(a) Informing residents of the selected developments regarding the preparation of the application, and providing for residents to assist in the development of the application.

(b) Once a draft application has been prepared, the HA shall make a copy available for reading in the management office; provide copies of the draft to any resident organization representing the residents of the development(s) involved; and provide adequate opportunity for comment by the residents of the development and their

representative organizations prior to making the application final.

(c) After HUD approval of a grant, notify the duly elected resident organization and if none exists, notify the residents of the development of the approval of the grant; provide notification of the availability of the HUD-approved implementation schedule in the management office for reading; and develop a system to facilitate a regular resident role in all aspects of program implementation.

§ 964.320 HUD Policy on training, employment, contracting and subcontracting of public housing residents.

In accordance with section 3 of the Housing and Urban Development Act of 1968 and the implementing regulations at 24 CFR part 135, PHAs, their contractors and subcontractors shall make best efforts, consistent with existing Federal, State, and local laws and regulations, to give low and very low-income persons the training and employment opportunities generated by section 3 covered assistance (as this term is defined in 24 CFR 135.7) and to give section 3 business concerns the contracting opportunities generated by section 3 covered assistance.

§ 964.325 Announcement of funding availability.

A Notice of Funding Availability will be published periodically in the *Federal Register* containing the amounts of funds available, funding criteria, where to obtain and submit applications, the deadline for the submissions, and further explanation of the selection criteria.

§ 964.330 Grant Set-Aside Assistance.

The Department may make available five percent (5%) of any amounts available in each fiscal year (subsequent to the first funding cycle) available to eligible HAs to supplement grants previously awarded under this program. These supplemental grants would be awarded if the HA demonstrates that the funds cannot otherwise be obtained and are needed to maintain adequate levels of services to residents.

§ 964.335 Grant agreement.

(a) *General.* HUD will enter into a grant agreement with the recipients of a Family Investment Centers grant, which defines the legal framework for the relationship between HUD and a HA.

(b) *Term of grant agreement.* A grant will be for a term of three to five years depending upon the tasks undertaken, as defined under this subpart.

§ 964.340 Resident compensation.

Residents employed to provide services or renovation or conversion work funded under this program shall be paid at a rate not less than the highest of:

(a) The minimum wage that would be applicable to the employees under the Fair Labor Standards Act of 1938 (FLSA), if section 6(a)(1) of the FLSA applied to the resident and if the resident were not exempt under section 13 of the FLSA;

(b) The State or local minimum wage for the most nearly comparable covered employment; or

(c) The prevailing rate of pay for persons employed in similar public occupations by the same employer.

§ 964.345 Treatment of income.

Program participation shall begin on the first day the resident enters training or begins to receive services.

Furthermore, the earnings of and benefits to any HA resident resulting from participation in the FIC program shall not be considered as income in computing the resident's total annual income that is used to determine the resident rental payment during:

(a) The period that the resident participates in the program; and

(b) The period that begins with the commencement of employment of the resident in the first job acquired by the resident after completion of the program that is not funded by assistance under the 1937 Act, and ends on the earlier of:

(1) The date the resident ceases to continue employment without good cause; or

(2) The expiration of the 18-month period beginning on the date of commencement of employment in the first job not funded by assistance under this program. (See § 913.106, Annual Income.)

§ 964.350 Administrative requirements.

The HUD Inspector General, the Comptroller General of the United States, or any duly authorized representative shall have access to all records required to be retained by this subpart or by any agreements with HUD for the purpose of audit or other examinations.

(a) Each HA receiving a grant shall submit to HUD an annual progress report, participant evaluation and assessment data and other information, as needed, regarding the effectiveness of FIC in achieving self-sufficiency.

(b) The policies, guidelines, and requirements of OMB Circular Nos. A-

110 and A-122 are applicable with respect to the acceptance and use of assistance by private nonprofit organizations.

PART 990—ANNUAL CONTRIBUTIONS FOR OPERATING SUBSIDY

8. The authority citation for part 990 would continue to read as follows:

Authority: 42 U.S.C. 1437g and 3535(d).

9. In § 990.108, a new paragraph (f) would be added, to read as follows:

§ 990.108 Other costs.

* * * * *

(f) *Funding for Resident Council Expenses.* In accordance with the provisions of 24 CFR part 964 and procedures determined by HUD, each HA with a duly elected resident council shall include in the operating subsidy eligibility calculation, \$25 per unit per year in support of the duly elected resident council's activities.

* * * * *

9. A new subpart D, consisting of §§ 990.401 through 990.405, would be added to read as follows:

Subpart D—Resident Management Corporations Operating Subsidy

Sec.

- 990.401 Calculation of operating subsidy.
- 990.402 Calculation of total income and preparation of operating budget.
- 990.403 Adjustments to total income.
- 990.404 Retention of excess revenues.
- 990.405 Use of retained revenues.

Subpart D—Resident Management Corporations Operating Subsidy**§ 990.401 Calculation of operating subsidy.**

Operating subsidy will be calculated separately for any project managed by a resident management corporation. This subsidy computation will be the same as the separate computation made for the balance of the projects in the PHA in accordance with this part, with the following exceptions:

(a) The project managed by a resident management corporation will have an Allowable Expense Level based on the actual expenses for the project in the fiscal year immediately preceding management under this subpart. These expenditures will include the project's share of any expenses which are overhead or centralized PHA expenditures. The expenses must represent a normal year's expenditures for the project, and must exclude all expenditures which are not normal fiscal year expenditures as to amount or

as to the purpose for which expended. Documentation of this expense level must be presented with the project budget and approved by HUD. Any project expenditures funded from a source of income other than operating subsidies or income generated by the locally owned public housing program will be excluded from the subsidy calculation. For budget years after the first budget year under management by the resident management corporation, the Allowable Expense Level will be calculated as it is for all other projects in accordance with § 990.105(e)(5).

(b) The resident management corporation project will estimate dwelling rental income based on the rent roll of the project immediately preceding the assumption of management responsibility under this subpart, increased by the estimate of inflation of tenant income used in calculating PFS subsidy.

(c) The resident management corporation will exclude, from its estimate of other income, any increased income directly generated by activities by the corporation or facilities operated by the corporation.

(d) Any reduction in the subsidy of a PHA that occurs as a result of fraud, waste, or mismanagement by the PHA shall not affect the subsidy calculation for the resident management corporation project.

§ 990.402 Calculation of total income and preparation of operating budget.

(a) Subject to § 990.403 of this section, the amount of funds provided by a PHA to a project managed by a resident management corporation under this subpart may not be reduced during the three-year period beginning on February 5, 1988 or on such later date as a resident management corporation first assumes management responsibility for the project.

(b) For purposes of determining the amount of funds provided to a project under § 990.402(a) of this section, the provision of technical assistance by the PHA to the resident management corporation will not be included.

(c) The resident management corporation and the PHA shall submit a separate operating budget, including the calculation of operating subsidy eligibility in accordance with § 990.401 of this section, for the project managed by a resident management corporation to HUD for approval. This budget will reflect all project expenditures and will identify which expenditures are related to the responsibilities of the resident management corporation and which are

related to the functions which will continue to be performed by the PHA.

(d) Each project or part of a project that is operating in accordance with the ACC amendment relating to this subpart and in accordance with a contract vesting maintenance responsibilities in the resident management corporation will have transferred, into a sub-account of the operating reserve of the host PHA, an operating reserve. Where all maintenance responsibilities for the resident-managed project are the responsibility of the corporation, the amount of the reserve made available to projects under this subpart will be the per unit cost amount available to the PHA operating reserve, exclusive of all inventories, prepaids and receivables (at the end of the PHA fiscal year preceding implementation), multiplied by the number of units in the project operated in accordance with the provision of this subpart. Where some, but not all, maintenance responsibilities are vested in the resident management corporation, the contract may provide for an appropriately reduced portion of the operating reserve to be transferred into the corporation's sub-account.

(e) The use of the reserve will be subject to all administrative procedures applicable to the conventionally owned public housing program. Any expenditure of funds from the reserve will be for eligible expenditures which are incorporated into an operating budget subject to approval by HUD.

(f) Investment of funds held in the reserve will be in accordance with the provisions of Chapter 4 of the Financial Management Handbook, 7476.1 REV.1 and interest generated will be included in the calculation of operating subsidy in accordance with this part.

§ 990.403 Adjustments to total income.

(a) Operating subsidy calculated in accordance with § 964.401 will reflect changes in inflation, utility rates and consumption, and changes in the number of units in the resident management project.

(b) In addition to the amount of income derived from the project (from sources such as rents and charges) and the operating subsidy calculated in accordance with § 990.401 of this subpart, the contract may specify that income be provided to the project from other sources of income of the PHA.

(c) The following conditions may not affect the amounts to be provided to a project managed by a resident management corporation under this subpart:

(1) Any reduction in the total income of a PHA that occurs as a result of fraud, waste, or mismanagement by the PHA.

(2) Any change in the total income of a PHA that occurs as a result of project-specific characteristics that are not shared by the project managed by the corporation under this subpart.

§ 990.404 Retention of excess revenues.

(a) Any income generated by a resident management corporation that exceeds the income estimated for the income category involved as specified in the RMC's management contract must be excluded in subsequent years in calculating: (1) The operating subsidy provided to a PHA under part 990 subpart A of this chapter.

(2) The funds provided by the PHA to the resident management corporation.

(b) The management contract must specify the amount of income expected to be derived from the project (from sources such as rents and charges) and

the amount of income to be provided to the project from the other sources of income of the PHA (such as operating subsidy under part 990 subpart A of this chapter, interest income, administrative fees, and rents). These income estimates must be calculated on a PHA-wide basis, as well as for each category of income on which the PHA and the resident management corporation agree, consistent with HUD's administrative instructions. Income estimates may provide for proration of anticipated project income between the corporation and the PHA, based upon the management and other project-associated responsibilities (if any) that are to be retained by the PHA under the contract.

§ 990.405 Use of retained revenues.

Any revenues retained by a resident management corporation under § 990.404 of this subpart may only be used for purposes of improving the maintenance and operation of the project, establishing businesses enterprises that employ residents of public housing, or acquiring additional dwelling units for lower income families. Units acquired by the resident management corporation will not be eligible for payment of operating subsidy.

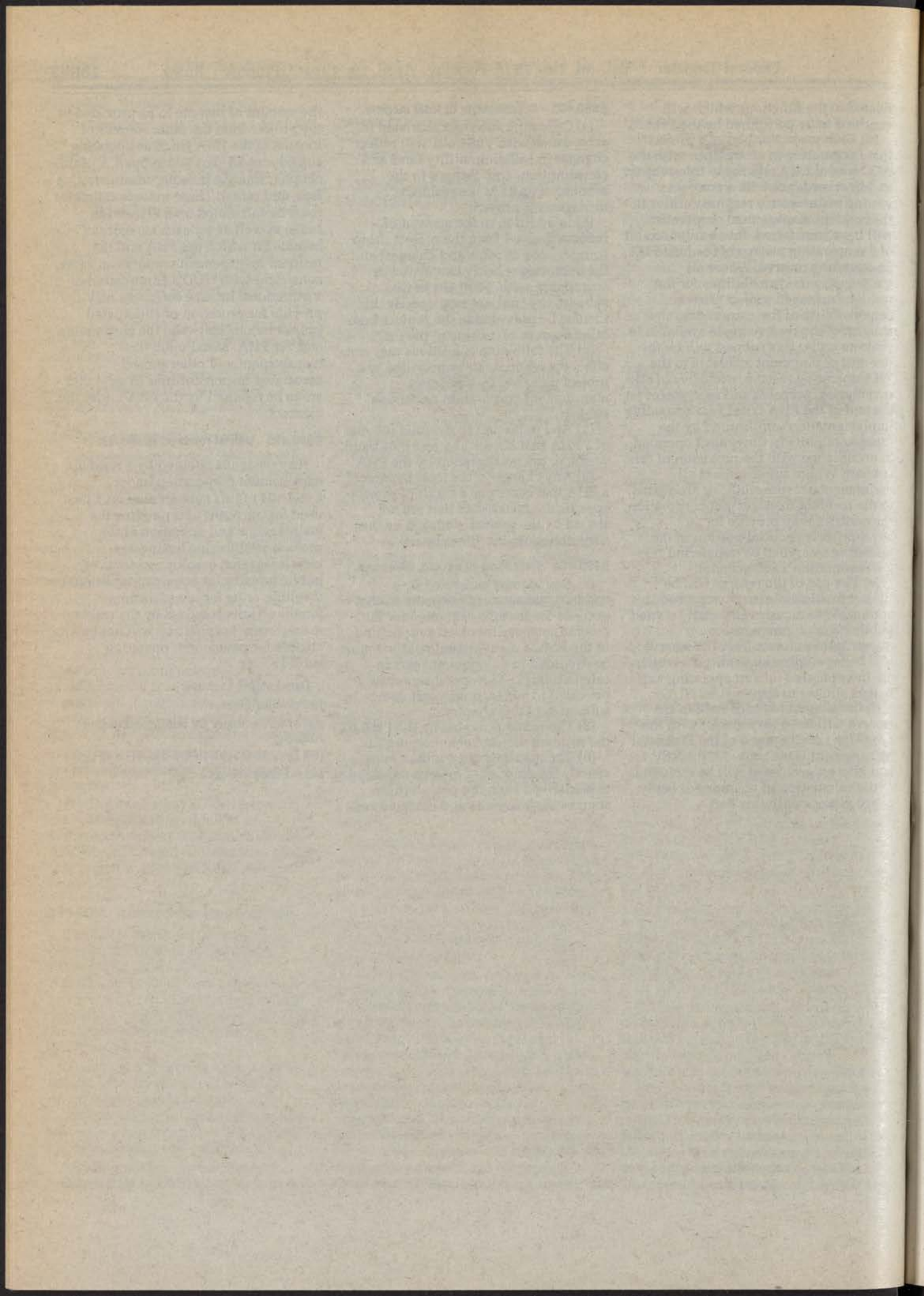
Dated: April 11, 1994.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 94-9319 Filed 4-18-94; 8:45 am]

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Part VII

**Environmental
Protection Agency**

**Combined Sewer Overflow (CSO) Control
Policy; Notice**

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4732-7]

Combined Sewer Overflow (CSO) Control Policy**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final policy.

SUMMARY: EPA has issued a national policy statement entitled "Combined Sewer Overflow (CSO) Control Policy." This policy establishes a consistent national approach for controlling discharges from CSOs to the Nation's waters through the National Pollutant Discharge Elimination System (NPDES) permit program.

FOR FURTHER INFORMATION CONTACT: Jeffrey Lape, Office of Wastewater Enforcement and Compliance, MC-4201, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260-7361.

SUPPLEMENTARY INFORMATION: The main purposes of the CSO Control Policy are to elaborate on the Environmental Protection Agency's (EPA's) National CSO Control Strategy published on September 8, 1989, at 54 FR 37370, and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in progress toward controlling CSOs, significant public health and water quality risks remain.

This Policy provides guidance to permittees with CSOs, NPDES authorities and State water quality standards authorities on coordinating the planning, selection, and implementation of CSO controls that meet the requirements of the CWA and allow for public involvement during the decision-making process.

Contained in the Policy are provisions for developing appropriate, site-specific NPDES permit requirements for all combined sewer systems (CSS) that overflow as a result of wet weather events. For example, the Policy lays out two alternative approaches—the "demonstration" and the "presumption" approaches—that provide communities with targets for CSO controls that achieve compliance with the Act, particularly protection of water quality and designated uses. The Policy also includes enforcement initiatives to require the immediate elimination of overflows that occur during dry weather and to ensure that the remaining CWA requirements are complied with as soon as practicable.

The permitting provisions of the Policy were developed as a result of

extensive input received from key stakeholders during a negotiated policy dialogue. The CSO stakeholders included representatives from States, environmental groups, municipal organizations and others. The negotiated dialogue was conducted during the Summer of 1992 by the Office of Water and the Office of Water's Management Advisory Group. The enforcement initiatives, including one which is underway to address CSOs during dry weather, were developed by EPA's Office of Water and Office of Enforcement.

EPA issued a Notice of Availability on the draft CSO Control Policy on January 19, 1993, (58 FR 4994) and requested comments on the draft Policy by March 22, 1993. Approximately forty-one sets of written comments were submitted by a variety of interest groups including cities and municipal groups, environmental groups, States, professional organizations and others. All comments were considered as EPA prepared the Final Policy. The public comments were largely supportive of the draft Policy. EPA received broad endorsement of and support for the key principles and provisions from most commenters. Thus, this final Policy does not include significant changes to the major provisions of the draft Policy, but rather, it includes clarification and better explanation of the elements of the Policy to address several of the questions that were raised in the comments. Persons wishing to obtain copies of the public comments or EPA's summary analysis of the comments may write or call the EPA contact person.

The CSO Policy represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives. The Policy recognizes the site-specific nature of CSOs and their impacts and provides the necessary flexibility to tailor controls to local situations. Major elements of the Policy ensure that CSO controls are cost effective and meet the objectives and requirements of the CWA.

The major provisions of the Policy are as follows.

CSO permittees should immediately undertake a process to accurately characterize their CSS and CSO discharges, demonstrate implementation of minimum technology-based controls identified in the Policy, and develop long-term CSO control plans which evaluate alternatives for attaining

compliance with the CWA, including compliance with water quality standards and protection of designated uses. Once the long-term CSO control plans are completed, permittees will be responsible to implement the plans' recommendations as soon as practicable.

State water quality standards authorities will be involved in the long-term CSO control planning effort as well. The water quality standards authorities will help ensure that development of the CSO permittees' long-term CSO control plans are coordinated with the review and possible revision of water quality standards on CSO-impacted waters.

NPDES authorities will issue/reissue or modify permits, as appropriate, to require compliance with the technology-based and water quality-based requirements of the CWA. After completion of the long-term CSO control plan, NPDES permits will be reissued or modified to incorporate the additional requirements specified in the Policy, such as performance standards for the selected controls based on average design conditions, a post-construction water quality assessment program, monitoring for compliance with water quality standards, and a reopener clause authorizing the NPDES authority to reopen and modify the permit if it is determined that the CSO controls fail to meet water quality standards or protect designated uses. NPDES authorities should commence enforcement actions against permittees that have CWA violations due to CSO discharges during dry weather. In addition, NPDES authorities should ensure the implementation of the minimum technology-based controls and incorporate a schedule into an appropriate enforceable mechanism, with appropriate milestone dates, to implement the required long-term CSO control plan. Schedules for implementation of the long-term CSO control plan may be phased based on the relative importance of adverse impacts upon water quality standards and designated uses, and on a permittee's financial capability.

EPA is developing extensive guidance to support the Policy and will announce the availability of the guidances and other outreach efforts through various means, as they become available. For example, EPA is preparing guidance on the nine minimum controls, characterization and monitoring of CSOs, development of long-term CSO control plans, and financial capability.

Permittees will be expected to comply with any existing CSO-related requirements in NPDES permits,

consent decrees or court orders unless revised to be consistent with this Policy.

The policy is organized as follows:

- I. Introduction
 - A. Purpose and Principles
 - B. Application of Policy
 - C. Effect on Current CSO Control Efforts
 - D. Small System Considerations
 - E. Implementation Responsibilities
 - F. Policy Development
- II. EPA Objectives for Permittees
 - A. Overview
 - B. Implementation of the Nine Minimum Controls
 - C. Long-Term CSO Control Plan
 1. Characterization, Monitoring, and Modeling of the Combined Sewer Systems
 2. Public Participation
 3. Consideration of Sensitive Areas
 4. Evaluation of Alternatives
 5. Cost/Performance Consideration
 6. Operational Plan
 7. Maximizing Treatment at the Existing POTW Treatment Plant
 8. Implementation Schedule
 9. Post-Construction Compliance Monitoring Program
- III. Coordination With State Water Quality Standards
 - A. Overview
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- IV. Expectations for Permitting Authorities
 - A. Overview
 - B. NPDES Permit Requirements
 1. Phase I Permits—Requirements for Demonstration of the Nine Minimum Controls and Development of the Long-Term CSO Control Plan
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 3. Phasing Considerations
- V. Enforcement and Compliance
 - A. Overview
 - B. Enforcement of CSO Dry Weather Discharge Prohibition
 - C. Enforcement of Wet Weather CSO Requirements
 1. Enforcement for Compliance With Phase I Permits
 2. Enforcement for Compliance With Phase II Permits
 - D. Penalties

List of Subjects in 40 CFR Part 122

Water pollution control.

Authority: Clean Water Act, 33 U.S.C. 1251 et seq.

Dated: April 8, 1994.

Carol M. Browner,
Administrator.

Combined Sewer Overflow (CSO) Control Policy

I. Introduction

A. Purpose and Principles

The main purposes of this Policy are to elaborate on EPA's National Combined Sewer Overflow (CSO) Control Strategy published on September 8, 1989 at 54 FR 37370 (1989

Strategy) and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in progress toward controlling CSOs, significant water quality risks remain.

A combined sewer system (CSS) is a wastewater collection system owned by a State or municipality (as defined by section 502(4) of the CWA) which conveys sanitary wastewaters (domestic, commercial and industrial wastewaters) and storm water through a single-pipe system to a Publicly Owned Treatment Works (POTW) Treatment Plant (as defined in 40 CFR 403.3(p)). A CSO is the discharge from a CSS at a point prior to the POTW Treatment Plant. CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment requirements applicable to POTWs.

CSOs consist of mixtures of domestic sewage, industrial and commercial wastewaters, and storm water runoff. CSOs often contain high levels of suspended solids, pathogenic microorganisms, toxic pollutants, floatables, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants. CSOs can cause exceedances of water quality standards (WQS). Such exceedances may pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation's waterways.

This Policy is intended to provide guidance to permittees with CSOs, National Pollutant Discharge Elimination System (NPDES) permitting authorities, State water quality standards authorities and enforcement authorities. The purpose of the Policy is to coordinate the planning, selection, design and implementation of CSO management practices and controls to meet the requirements of the CWA and to involve the public fully during the decision making process.

This Policy reiterates the objectives of the 1989 Strategy:

1. To ensure that if CSOs occur, they are only as a result of wet weather;
2. To bring all wet weather CSO discharge points into compliance with the technology-based and water quality-based requirements of the CWA; and
3. To minimize water quality, aquatic biota, and human health impacts from CSOs.

This CSO Control Policy represents a comprehensive national strategy to ensure that municipalities, permitting

authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives and requirements. The Policy recognizes the site-specific nature of CSOs and their impacts and provides the necessary flexibility to tailor controls to local situations. Four key principles of the Policy ensure that CSO controls are cost-effective and meet the objectives of the CWA. The key principles are:

1. Providing clear levels of control that would be presumed to meet appropriate health and environmental objectives;
2. Providing sufficient flexibility to municipalities, especially financially disadvantaged communities, to consider the site-specific nature of CSOs and to determine the most cost-effective means of reducing pollutants and meeting CWA objectives and requirements;
3. Allowing a phased approach to implementation of CSO controls considering a community's financial capability; and
4. Review and revision, as appropriate, of water quality standards and their implementation procedures when developing CSO control plans to reflect the site-specific wet weather impacts of CSOs.

This Policy is being issued in support of EPA's regulations and policy initiatives. This Policy is Agency guidance only and does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the law and regulations on the basis of specific facts when permits are issued. The Administration has recommended that the 1994 amendments to the CWA endorse this final Policy.

B. Application of Policy

The permitting provisions of this Policy apply to all CSSs that overflow as a result of storm water flow, including snow melt runoff (40 CFR 122.26(b)(13)). Discharges from CSSs during dry weather are prohibited by the CWA. Accordingly, the permitting provisions of this Policy do not apply to CSOs during dry weather. Dry weather flow is the flow in a combined sewer that results from domestic sewage, groundwater infiltration, commercial and industrial wastewaters, and any other non-precipitation related flows (e.g., tidal infiltration). In addition to

the permitting provisions, the Enforcement and Compliance section of this Policy describes an enforcement initiative being developed for overflows that occur during dry weather.

Consistent with the 1989 Strategy, 30 States that submitted CSO permitting strategies have received EPA approval or, in the case of one State, conditional approval of its strategy. States and EPA Regional Offices should review these strategies and negotiate appropriate revisions to them to implement this Policy. Permitting authorities are encouraged to evaluate water pollution control needs on a watershed management basis and coordinate CSO control efforts with other point and nonpoint source control activities.

C. Effect on Current CSO Control Efforts

EPA recognizes that extensive work has been done by many Regions, States, and municipalities to abate CSOs. As such, portions of this Policy may already have been addressed by permittees' previous efforts to control CSOs. Therefore, portions of this Policy may not apply, as determined by the permitting authority on a case-by-case basis, under the following circumstances:

1. Any permittee that, on the date of publication of this final Policy, has completed or substantially completed construction of CSO control facilities that are designed to meet WQS and protect designated uses, and where it has been determined that WQS are being or will be attained, is not covered by the initial planning and construction provisions in this Policy; however, the operational plan and post-construction monitoring provisions continue to apply. If, after monitoring, it is determined that WQS are not being attained, the permittee should be required to submit a revised CSO control plan that, once implemented, will attain WQS.

2. Any permittee that, on the date of publication of this final Policy, has substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, and such program is considered by the NPDES permitting authority to be adequate to meet WQS and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, should complete those facilities without further planning activities otherwise expected by this Policy. Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.

3. Any permittee that has previously constructed CSO control facilities in an effort to comply with WQS but has failed to meet such applicable standards or to protect designated uses due to remaining CSOs may receive consideration for such efforts in future permits or enforceable orders for long-term CSO control planning, design and implementation.

In the case of any ongoing or substantially completed CSO control effort, the NPDES permit or other enforceable mechanism, as appropriate, should be revised to include all appropriate permit requirements consistent with Section IV.B. of this Policy.

D. Small System Considerations

The scope of the long-term CSO control plan, including the characterization, monitoring and modeling, and evaluation of alternatives portions of this Policy may be difficult for some small CSSs. At the discretion of the NPDES Authority, jurisdictions with populations under 75,000 may not need to complete each of the formal steps outlined in Section II.C. of this Policy, but should be required through their permits or other enforceable mechanisms to comply with the nine minimum controls (II.B), public participation (II.C.2), and sensitive areas (II.C.3) portions of this Policy. In addition, the permittee may propose to implement any of the criteria contained in this Policy for evaluation of alternatives described in II.C.4. Following approval of the proposed plan, such jurisdictions should construct the control projects and propose a monitoring program sufficient to determine whether WQS are attained and designated uses are protected.

In developing long-term CSO control plans based on the small system considerations discussed in the preceding paragraph, permittees are encouraged to discuss the scope of their long-term CSO control plan with the WQS authority and the NPDES authority. These discussions will ensure that the plan includes sufficient information to enable the permitting authority to identify the appropriate CSO controls.

E. Implementation Responsibilities

NPDES authorities (authorized States or EPA Regional Offices, as appropriate) are responsible for implementing this Policy. It is their responsibility to assure that CSO permittees develop long-term CSO control plans and that NPDES permits meet the requirements of the CWA. Further, they are responsible for coordinating the review of the long-term

CSO control plan and the development of the permit with the WQS authority to determine if revisions to the WQS are appropriate. In addition, they should determine the appropriate vehicle (i.e., permit reissuance, information request under CWA section 308 or State equivalent or enforcement action) to ensure that compliance with the CWA is achieved as soon as practicable.

Permittees are responsible for documenting the implementation of the nine minimum controls and developing and implementing a long-term CSO control plan, as described in this Policy. EPA recognizes that financial considerations are a major factor affecting the implementation of CSO controls. For that reason, this Policy allows consideration of a permittee's financial capability in connection with the long-term CSO control planning effort, WQS review, and negotiation of enforceable schedules. However, each permittee is ultimately responsible for aggressively pursuing financial arrangements for the implementation of its long-term CSO control plan. As part of this effort, communities should apply to their State Revolving Fund program, or other assistance programs as appropriate, for financial assistance.

EPA and the States will undertake action to assure that all permittees with CSSs are subject to a consistent review in the permit development process, have permit requirements that achieve compliance with the CWA, and are subject to enforceable schedules that require the earliest practicable compliance date considering physical and financial feasibility.

F. Policy Development

This Policy devotes a separate section to each step involved in developing and implementing CSO controls. This is not to imply that each function occurs separately. Rather, the entire process surrounding CSO controls, community planning, WQS and permit development/revision, enforcement/compliance actions and public participation must be coordinated to control CSOs effectively. Permittees and permitting authorities are encouraged to consider innovative and alternative approaches and technologies that achieve the objectives of this Policy and the CWA.

In developing this Policy, EPA has included information on what responsible parties are expected to accomplish. Subsequent documents will provide additional guidance on how the objectives of this Policy should be met. These documents will provide further guidance on: CSO permit writing, the nine minimum controls, long-term CSO

control plans, financial capability, sewer system characterization and receiving water monitoring and modeling, and application of WQS to CSO-impacted waters. For most CSO control efforts however, sufficient detail has been included in this Policy to begin immediate implementation of its provisions.

II. EPA Objectives for Permittees

A. Overview

Permittees with CSSs that have CSOs should immediately undertake a process to accurately characterize their sewer systems, to demonstrate implementation of the nine minimum controls, and to develop a long-term CSO control plan.

B. Implementation of the Nine Minimum Controls

Permittees with CSOs should submit appropriate documentation demonstrating implementation of the nine minimum controls, including any proposed schedules for completing minor construction activities. The nine minimum controls are:

1. Proper operation and regular maintenance programs for the sewer system and the CSOs;
2. Maximum use of the collection system for storage;
3. Review and modification of pretreatment requirements to assure CSO impacts are minimized;
4. Maximization of flow to the POTW for treatment;
5. Prohibition of CSOs during dry weather;
6. Control of solid and floatable materials in CSOs;
7. Pollution prevention;
8. Public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts; and
9. Monitoring to effectively characterize CSO impacts and the efficacy of CSO controls.

Selection and implementation of actual control measures should be based on site-specific considerations including the specific CSS's characteristics discussed under the sewer system characterization and monitoring portions of this Policy. Documentation of the nine minimum controls may include operation and maintenance plans, revised sewer use ordinances for industrial users, sewer system inspection reports, infiltration/inflow studies, pollution prevention programs, public notification plans, and facility plans for maximizing the capacities of the existing collection, storage and treatment systems, as well as contracts and schedules for minor construction

programs for improving the existing system's operation. The permittee should also submit any information or data on the degree to which the nine minimum controls achieve compliance with water quality standards. These data and information should include results made available through monitoring and modeling activities done in conjunction with the development of the long-term CSO control plan described in this Policy.

This documentation should be submitted as soon as practicable, but no later than two years after the requirement to submit such documentation is included in an NPDES permit or other enforceable mechanism. Implementation of the nine minimum controls with appropriate documentation should be completed as soon as practicable but no later than January 1, 1997. These dates should be included in an appropriate enforceable mechanism.

Because the CWA requires immediate compliance with technology-based controls (section 301(b)), which on a Best Professional Judgment basis should include the nine minimum controls, a compliance schedule for implementing the nine minimum controls, if necessary, should be included in an appropriate enforceable mechanism.

C. Long-Term CSO Control Plan

Permittees with CSOs are responsible for developing and implementing long-term CSO control plans that will ultimately result in compliance with the requirements of the CWA. The long-term plans should consider the site-specific nature of CSOs and evaluate the cost effectiveness of a range of control options/strategies. The development of the long-term CSO control plan and its subsequent implementation should also be coordinated with the NPDES authority and the State authority responsible for reviewing and revising the State's WQS. The selected controls should be designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses.

This policy identifies EPA's major objectives for the long-term CSO control plan. Permittees should develop and submit this long-term CSO control plan as soon as practicable, but generally within two years after the date of the NPDES permit provision, Section 308 information request, or enforcement action requiring the permittee to develop the plan. NPDES authorities may establish a longer timetable for completion of the long-term CSO

control plan on a case-by-case basis to account for site-specific factors which may influence the complexity of the planning process. Once agreed upon, these dates should be included in an appropriate enforceable mechanism.

EPA expects each long-term CSO control plan to utilize appropriate information to address the following minimum elements. The Plan should also include both fixed-date project implementation schedules (which may be phased) and a financing plan to design and construct the project as soon as practicable. The minimum elements of the long-term CSO control plan are described below.

1. Characterization, Monitoring, and Modeling of the Combined Sewer System

In order to design a CSO control plan adequate to meet the requirements of the CWA, a permittee should have a thorough understanding of its sewer system, the response of the system to various precipitation events, the characteristics of the overflows, and the water quality impacts that result from CSOs. The permittee should adequately characterize through monitoring, modeling, and other means as appropriate, for a range of storm events, the response of its sewer system to wet weather events including the number, location and frequency of CSOs, volume, concentration and mass of pollutants discharged and the impacts of the CSOs on the receiving waters and their designated uses. The permittee may need to consider information on the contribution and importance of other pollution sources in order to develop a final plan designed to meet water quality standards. The purpose of the system characterization, monitoring and modeling program initially is to assist the permittee in developing appropriate measures to implement the nine minimum controls and, if necessary, to support development of the long-term CSO control plan. The monitoring and modeling data also will be used to evaluate the expected effectiveness of both the nine minimum controls and, if necessary, the long-term CSO controls, to meet WQS.

The major elements of a sewer system characterization are described below.

a. *Rainfall Records*—The permittee should examine the complete rainfall record for the geographic area of its existing CSS using sound statistical procedures and best available data. The permittee should evaluate flow variations in the receiving water body to correlate between CSOs and receiving water conditions.

b. Combined Sewer System Characterization—The permittee should evaluate the nature and extent of its sewer system through evaluation of available sewer system records, field inspections and other activities necessary to understand the number, location and frequency of overflows and their location relative to sensitive areas and to pollution sources in the collection system, such as indirect significant industrial users.

c. CSO Monitoring—The permittee should develop a comprehensive, representative monitoring program that measures the frequency, duration, flow rate, volume and pollutant concentration of CSO discharges and assesses the impact of the CSOs on the receiving waters. The monitoring program should include necessary CSO effluent and ambient in-stream monitoring and, where appropriate, other monitoring protocols such as biological assessment, toxicity testing and sediment sampling. Monitoring parameters should include, for example, oxygen demanding pollutants, nutrients, toxic pollutants, sediment contaminants, pathogens, bacteriological indicators (e.g., *Enterococcus*, *E. Coli*), and toxicity. A representative sample of overflow points can be selected that is sufficient to allow characterization of CSO discharges and their water quality impacts and to facilitate evaluation of control plan alternatives.

d. Modeling—Modeling of a sewer system is recognized as a valuable tool for predicting sewer system response to various wet weather events and assessing water quality impacts when evaluating different control strategies and alternatives. EPA supports the proper and effective use of models, where appropriate, in the evaluation of the nine minimum controls and the development of the long-term CSO control plan. It is also recognized that there are many models which may be used to do this. These models range from simple to complex. Having decided to use a model, the permittee should base its choice of a model on the characteristics of its sewer system, the number and location of overflow points, and the sensitivity of the receiving water body to the CSO discharges. Use of models should include appropriate calibration and verification with field measurements. The sophistication of the model should relate to the complexity of the system to be modeled and to the information needs associated with evaluation of CSO control options and water quality impacts. EPA believes that continuous simulation models, using historical rainfall data, may be the best

way to model sewer systems, CSOs, and their impacts. Because of the iterative nature of modeling sewer systems, CSOs, and their impacts, monitoring and modeling efforts are complementary and should be coordinated.

2. Public Participation

In developing its long-term CSO control plan, the permittee will employ a public participation process that actively involves the affected public in the decision-making to select the long-term CSO controls. The affected public includes rate payers, industrial users of the sewer system, persons who reside downstream from the CSOs, persons who use and enjoy these downstream waters, and any other interested persons.

3. Consideration of Sensitive Areas

EPA expects a permittee's long-term CSO control plan to give the highest priority to controlling overflows to sensitive areas. Sensitive areas, as determined by the NPDES authority in coordination with State and Federal agencies, as appropriate, include designated Outstanding National Resource Waters, National Marine Sanctuaries, waters with threatened or endangered species and their habitat, waters with primary contact recreation, public drinking water intakes or their designated protection areas, and shellfish beds. For such areas, the long-term CSO control plan should:

- a. Prohibit new or significantly increased overflows;
- b. i. Eliminate or relocate overflows that discharge to sensitive areas wherever physically possible and economically achievable, except where elimination or relocation would provide less environmental protection than additional treatment; or
- ii. Where elimination or relocation is not physically possible and economically achievable, or would provide less environmental protection than additional treatment, provide the level of treatment for remaining overflows deemed necessary to meet WQS for full protection of existing and designated uses. In any event, the level of control should not be less than those described in Evaluation of Alternatives below; and
- c. Where elimination or relocation has been proven not to be physically possible and economically achievable, permitting authorities should require, for each subsequent permit term, a reassessment based on new or improved techniques to eliminate or relocate, or on changed circumstances that influence economic achievability.

4. Evaluation of Alternatives

EPA expects the long-term CSO control plan to consider a reasonable range of alternatives. The plan should, for example, evaluate controls that would be necessary to achieve zero overflow events per year, an average of one to three, four to seven, and eight to twelve overflow events per year. Alternatively, the long-term plan could evaluate controls that achieve 100% capture, 90% capture, 85% capture, 80% capture, and 75% capture for treatment. The long-term control plan should also consider expansion of POTW secondary and primary capacity in the CSO abatement alternative analysis. The analysis of alternatives should be sufficient to make a reasonable assessment of cost and performance as described in Section II.C.5. Because the final long-term CSO control plan will become the basis for NPDES permit limits and requirements, the selected controls should be sufficient to meet CWA requirements.

In addition to considering sensitive areas, the long-term CSO control plan should adopt one of the following approaches:

a. "Presumption" Approach

A program that meets any of the criteria listed below would be presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, provided the permitting authority determines that such presumption is reasonable in light of the data and analysis conducted in the characterization, monitoring, and modeling of the system and the consideration of sensitive areas described above. These criteria are provided because data and modeling of wet weather events often do not give a clear picture of the level of CSO controls necessary to protect WQS.

- i. No more than an average of four overflow events per year, provided that the permitting authority may allow up to two additional overflow events per year. For the purpose of this criterion, an overflow event is one or more overflows from a CSS as the result of a precipitation event that does not receive the minimum treatment specified below; or
- ii. The elimination or the capture for treatment of no less than 85% by volume of the combined sewage collected in the CSS during precipitation events on a system-wide annual average basis; or
- iii. The elimination or removal of no less than the mass of the pollutants, identified as causing water quality impairment through the sewer system

characterization, monitoring, and modeling effort, for the volumes that would be eliminated or captured for treatment under paragraph ii. above. Combined sewer flows remaining after implementation of the nine minimum controls and within the criteria specified at II.C.4.a.i or ii, should receive a minimum of:

- Primary clarification (Removal of floatables and settleable solids may be achieved by any combination of treatment technologies or methods that are shown to be equivalent to primary clarification.);

- Solids and floatables disposal; and
- Disinfection of effluent, if necessary, to meet WQS, protect designated uses and protect human health, including removal of harmful disinfection chemical residuals, where necessary.

b. "Demonstration" Approach

A permittee may demonstrate that a selected control program, though not meeting the criteria specified in II.C.4.a. above is adequate to meet the water quality-based requirements of the CWA. To be a successful demonstration, the permittee should demonstrate each of the following:

- i. The planned control program is adequate to meet WQS and protect designated uses, unless WQS or uses cannot be met as a result of natural background conditions or pollution sources other than CSOs;

- ii. The CSO discharges remaining after implementation of the planned control program will not preclude the attainment of WQS or the receiving waters' designated uses or contribute to their impairment. Where WQS and designated uses are not met in part because of natural background conditions or pollution sources other than CSOs, a total maximum daily load, including a wasteload allocation and a load allocation, or other means should be used to apportion pollutant loads;

- iii. The planned control program will provide the maximum pollution reduction benefits reasonably attainable; and

- iv. The planned control program is designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS or designated uses.

5. Cost/Performance Considerations

The permittee should develop appropriate cost/performance curves to demonstrate the relationships among a comprehensive set of reasonable control alternatives that correspond to the different ranges specified in Section

II.C.4. This should include an analysis to determine where the increment of pollution reduction achieved in the receiving water diminishes compared to the increased costs. This analysis, often known as knee of the curve, should be among the considerations used to help guide selection of controls.

6. Operational Plan

After agreement between the permittee and NPDES authority on the necessary CSO controls to be implemented under the long-term CSO control plan, the permittee should revise the operation and maintenance program developed as part of the nine minimum controls to include the agreed-upon long-term CSO controls. The revised operation and maintenance program should maximize the removal of pollutants during and after each precipitation event using all available facilities within the collection and treatment system. For any flows in excess of the criteria specified at II.C.4.a.i., ii. or iii and not receiving the treatment specified in II.C.4.a, the operational plan should ensure that such flows receive treatment to the greatest extent practicable.

7. Maximizing Treatment at the Existing POTW Treatment Plant

In some communities, POTW treatment plants may have primary treatment capacity in excess of their secondary treatment capacity. One effective strategy to abate pollution resulting from CSOs is to maximize the delivery of flows during wet weather to the POTW treatment plant for treatment. Delivering these flows can have two significant water quality benefits: First, increased flows during wet weather to the POTW treatment plant may enable the permittee to eliminate or minimize overflows to sensitive areas; second, this would maximize the use of available POTW facilities for wet weather flows and would ensure that combined sewer flows receive at least primary treatment prior to discharge.

Under EPA regulations, the intentional diversion of waste streams from any portion of a treatment facility, including secondary treatment, is a bypass. EPA bypass regulations at 40 CFR 122.41(m) allow for a facility to bypass some or all the flow from its treatment process under specified limited circumstances. Under the regulation, the permittee must show that the bypass was unavoidable to prevent loss of life, personal injury or severe property damage, that there was no feasible alternative to the bypass and that the permittee submitted the required notices. In addition, the

regulation provides that a bypass may be approved only after consideration of adverse effects.

Normally, it is the responsibility of the permittee to document, on a case-by-case basis, compliance with 40 CFR 122.41(m) in order to bypass flows legally. For some CSO-related permits, the study of feasible alternatives in the control plan may provide sufficient support for the permit record and for approval of a CSO-related bypass in the permit itself, and to define the specific parameters under which a bypass can legally occur. For approval of a CSO-related bypass, the long-term CSO control plan, at a minimum, should provide justification for the cut-off point at which the flow will be diverted from the secondary treatment portion of the treatment plant, and provide a benefit-cost analysis demonstrating that conveyance of wet weather flow to the POTW for primary treatment is more beneficial than other CSO abatement alternatives such as storage and pump back for secondary treatment, sewer separation, or satellite treatment. Such a permit must define under what specific wet weather conditions a CSO-related bypass is allowed and also specify what treatment or what monitoring, and effluent limitations and requirements apply to the bypass flow. The permit should also provide that approval for the CSO-related bypass will be reviewed and may be modified or terminated if there is a substantial increase in the volume or character of pollutants being introduced to the POTW. The CSO-related bypass provision in the permit should also make it clear that all wet weather flows passing the headworks of the POTW treatment plant will receive at least primary clarification and solids and floatables removal and disposal, and disinfection, where necessary, and any other treatment that can reasonably be provided.

Under this approach, EPA would allow a permit to authorize a CSO-related bypass of the secondary treatment portion of the POTW treatment plant for combined sewer flows in certain identified circumstances. This provision would apply only to those situations where the POTW would ordinarily meet the requirements of 40 CFR 122.41(m) as evaluated on a case-by-case basis. Therefore, there must be sufficient data in the administrative record (reflected in the permit fact sheet or statement of basis) supporting all the requirements in 40 CFR 122.41(m)(4) for approval of an anticipated bypass.

For the purposes of applying this regulation to CSO permittees, "severe property damage" could include

situations where flows above a certain level wash out the POTW's secondary treatment system. EPA further believes that the feasible alternatives requirement of the regulation can be met if the record shows that the secondary treatment system is properly operated and maintained, that the system has been designed to meet secondary limits for flows greater than the peak dry weather flow, plus an appropriate quantity of wet weather flow, and that it is either technically or financially infeasible to provide secondary treatment at the existing facilities for greater amounts of wet weather flow. The feasible alternative analysis should include, for example, consideration of enhanced primary treatment (e.g., chemical addition) and non-biological secondary treatment. Other bases supporting a finding of no feasible alternative may also be available on a case-by-case basis. As part of its consideration of possible adverse effects resulting from the bypass, the permitting authority should also ensure that the bypass will not cause exceedances of WQS.

This Policy does not address the appropriateness of approving anticipated bypasses through NPDES permits in advance outside the CSO context.

8. Implementation Schedule

The permittee should include all pertinent information in the long term control plan necessary to develop the construction and financing schedule for implementation of CSO controls. Schedules for implementation of the CSO controls may be phased based on the relative importance of adverse impacts upon WQS and designated uses, priority projects identified in the long-term plan, and on a permittee's financial capability.

Construction phasing should consider:

- a. Eliminating overflows that discharge to sensitive areas as the highest priority;
- b. Use impairment;
- c. The permittee's financial capability including consideration of such factors as:
 - i. Median household income;
 - ii. Total annual wastewater and CSO control costs per household as a percent of median household income;
 - iii. Overall net debt as a percent of full market property value;
 - iv. Property tax revenues as a percent of full market property value;
 - v. Property tax collection rate;
 - vi. Unemployment; and
 - vii. Bond rating;
- d. Grant and loan availability;

e. Previous and current residential, commercial and industrial sewer user fees and rate structures; and

f. Other viable funding mechanisms and sources of financing.

9. Post-Construction Compliance Monitoring Program

The selected CSO controls should include a post-construction water quality monitoring program adequate to verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of CSO controls. This water quality compliance monitoring program should include a plan to be approved by the NPDES authority that details the monitoring protocols to be followed, including the necessary effluent and ambient monitoring and, where appropriate, other monitoring protocols such as biological assessments, whole effluent toxicity testing, and sediment sampling.

III. Coordination With State Water Quality Standards

A. Overview

WQS are State adopted, or Federally promulgated rules which serve as the goals for the water body and the legal basis for the water quality-based NPDES permit requirements under the CWA. WQS consist of uses which States designate for their water bodies, criteria to protect the uses, an anti-degradation policy to protect the water quality improvements gained and other policies affecting the implementation of the standards. A primary objective of the long-term CSO control plan is to meet WQS, including the designated uses through reducing risks to human health and the environment by eliminating, relocating or controlling CSOs to the affected waters.

State WQS authorities, NPDES authorities, EPA regional offices, permittees, and the public should meet early and frequently throughout the long-term CSO control planning process. Development of the long-term plan should be coordinated with the review and appropriate revision of WQS and implementation procedures on CSO-impacted waters to ensure that the long-term controls will be sufficient to meet water quality standards. As part of these meetings, participants should agree on the data, information and analyses needed to support the development of the long-term CSO control plan and the review of applicable WQS, and implementation procedures, if appropriate. Agreements should be reached on the monitoring protocols and models that will be used

to evaluate the water quality impacts of the overflows, to analyze the attainability of the WQS and to determine the water quality-based requirements for the permit. Many opportunities exist for permittees and States to share information as control programs are developed and as WQS are reviewed. Such information should assist States in determining the need for revisions to WQS and implementation procedures to better reflect the site-specific wet weather impacts of CSOs. Coordinating the development of the long-term CSO control plan and the review of the WQS and implementation procedures provides greater assurance that the long-term control plan selected and the limits and requirements included in the NPDES permit will be sufficient to meet WQS and to comply with sections 301(b)(1)(C) and 402(a)(2) of the CWA.

EPA encourages States and permittees jointly to sponsor workshops for the affected public in the development of the long-term CSO control plan and during the development of appropriate revisions to WQS for CSO-impacted waters. Workshops provide a forum for including the public in discussions of the implications of the proposed long-term CSO control plan on the water quality and uses for the receiving water.

B. Water Quality Standards Reviews

The CWA requires States to periodically, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. States must provide the public an opportunity to comment on any proposed revision to water quality standards and all revisions must be submitted to EPA for review and approval.

EPA regulations and guidance provide States with the flexibility to adapt their WQS, and implementation procedures to reflect site-specific conditions including those related to CSOs. For example, a State may adopt site-specific criteria for a particular pollutant if the State determines that the site-specific criteria fully protects the designated use (40 CFR 131.11). In addition, the regulations at 40 CFR 131.10(g), (h), and (j) specify when and how a designated use may be modified. A State may remove a designated use from its water quality standards only if the designated use is not an existing use. An existing use is a use actually attained in the water body on or after November 28, 1975. Furthermore, a State may not remove a designated use that will be attained by implementing the

technology-based effluent limits required under sections 301(b) and 306 of the CWA and by implementing cost-effective and reasonable best management practices for nonpoint source controls. Thus, if a State has a reasonable basis to determine that the current designated use could be attained after implementation of the technology-based controls of the CWA, then the use could not be removed.

In determining whether a use is attainable and prior to removing a designated use, States must conduct and submit to EPA a use attainability analysis. A use attainability analysis is a structured scientific assessment of the factors affecting the use, including the physical, chemical, biological, and economic factors described in 40 CFR 131.10(g). As part of the analysis, States should evaluate whether the designated use could be attained if CSO controls were implemented. For example, States should examine if sediment loadings from CSOs could be reduced so as not to bury spawning beds, or if biochemical oxygen demanding material in the effluent or the toxicity of the effluent could be corrected so as to reduce the acute or chronic physiological stress on or bioaccumulation potential of aquatic organisms.

In reviewing the attainability of their WQS and the applicability of their implementation procedures to CSO-impacted waters, States are encouraged to define more explicitly their recreational and aquatic life uses and then, if appropriate, modify the criteria accordingly to protect the designated uses.

Another option is for States to adopt partial uses by defining when primary contact recreation such as swimming does not exist, such as during certain seasons of the year in northern climates or during a particular type of storm event. In making such adjustments to their uses, States must ensure that downstream uses are protected, and that during other seasons or after the storm event has passed, the use is fully protected.

In addition to defining recreational uses with greater specificity, States are also encouraged to define the aquatic uses more precisely. Rather than "aquatic life use protection," States should consider defining the type of fishery to be protected such as a cold water fishery (e.g., trout or salmon) or a warm weather fishery (e.g., bluegill or large mouth bass). Explicitly defining the type of fishery to be protected may assist the permittee in enlisting the support of citizens for a CSO control plan.

A water quality standard variance may be appropriate, in limited circumstances on CSO-impacted waters, where the State is uncertain as to whether a standard can be attained and time is needed for the State to conduct additional analyses on the attainability of the standard. Variances are short-term modifications in water quality standards. Subject to EPA approval, States, with their own statutory authority, may grant a variance to a specific discharger for a specific pollutant. The justification for a variance is similar to that required for a permanent change in the standard, although the showings needed are less rigorous. Variances are also subject to public participation requirements of the water quality standards and permits programs and are reviewable generally every three years. A variance allows the CSO permit to be written to meet the "modified" water quality standard as analyses are conducted and as progress is made to improve water quality.

Justifications for variances are the same as those identified in 40 CFR 131.10(g) for modifications in uses. States must provide an opportunity for public review and comment on all variances. If States use the permit as the vehicle to grant the variance, notice of the permit must clearly state that the variance modifies the State's water quality standards. If the variance is approved, the State appends the variance to the State's standards and reviews the variance every three years.

IV. Expectations for Permitting Authorities

A. Overview

CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment regulations applicable to publicly owned treatment works (*Montgomery Environmental Coalition vs. Costle*, 646 F.2d 568 (D.C. Cir. 1980)).

All permits for CSOs should require the nine minimum controls as a minimum best available technology economically achievable and best conventional technology (BAT/BCT) established on a best professional judgment (BPF) basis by the permitting authority (40 CFR 125.3). Water quality-based requirements are to be established based on applicable water quality standards.

This policy establishes a uniform, nationally consistent approach to developing and issuing NPDES permits to permittees with CSOs. Permits for

CSOs should be developed and issued expeditiously. A single, system-wide permit generally should be issued for all discharges, including CSOs, from a CSS operated by a single authority. When different parts of a single CSS are operated by more than one authority, permits issued to each authority should generally require joint preparation and implementation of the elements of this Policy and should specifically define the responsibilities and duties of each authority. Permittees should be required to coordinate system-wide implementation of the nine minimum controls and the development and implementation of the long-term CSO control plan.

The individual authorities are responsible for their own discharges and should cooperate with the permittee for the POTW receiving the flows from the CSS. When a CSO is permitted separately from the POTW, both permits should be cross-referenced for informational purposes.

EPA Regions and States should review the CSO permitting priorities established in the State CSO Permitting Strategies developed in response to the 1989 Strategy. Regions and States may elect to revise these previous priorities. In setting permitting priorities, Regions and States should not just focus on those permittees that have initiated monitoring programs. When setting priorities, Regions and States should consider, for example, the known or potential impact of CSOs on sensitive areas, and the extent of upstream industrial user discharges to the CSS.

During the permittee's development of the long-term CSO control plan, the permit writer should promote coordination between the permittee and State WQS authority in connection with possible WQS revisions. Once the permittee has completed development of the long-term CSO control plan and has coordinated with the permitting authority the selection of the controls necessary to meet the requirements of the CWA, the permitting authority should include in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan, including conditions for water quality monitoring and operation and maintenance.

B. NPDES Permit Requirements

Following are the major elements of NPDES permits to implement this Policy and ensure protection of water quality.

1. Phase I Permits—Requirements for Demonstration of Implementation of the Nine Minimum Controls and Development of the Long-Term CSO Control Plan

In the Phase I permit issued/modified to reflect this Policy, the NPDES authority should at least require permittees to:

a. Immediately implement BAT/BCT, which at a minimum includes the nine minimum controls, as determined on a BPJ basis by the permitting authority;

b. Develop and submit a report documenting the implementation of the nine minimum controls within two years of permit issuance/modification;

c. Comply with applicable WQS, no later than the date allowed under the State's WQS, expressed in the form of a narrative limitation; and

d. develop and submit, consistent with this Policy and based on a schedule in an appropriate enforceable mechanism, a long-term CSO control plan as soon as practicable, but generally within two years after the effective date of the permit issuance/modification. However, permitting authorities may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors that may influence the complexity of the planning process.

The NPDES authority should include compliance dates on the fastest practicable schedule for each of the nine minimum controls in an appropriate enforceable mechanism issued in conjunction with the Phase I permit. The use of enforceable orders is necessary unless Congress amends the CWA. All orders should require compliance with the nine minimum controls no later than January 1, 1997.

2. Phase II Permits—Requirements for Implementation of a Long-Term CSO Control Plan

Once the permittee has completed development of the long-term CSO control plan and the selection of the controls necessary to meet CWA requirements has been coordinated with the permitting and WQS authorities, the permitting authority should include, in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan as soon as practicable. Where the permittee has selected controls based on the "presumption" approach described in Section II.C.4, the permitting authority must have determined that the presumption that such level of treatment will achieve water quality standards is reasonable in light of the

data and analysis conducted under this Policy. The Phase II permit should contain:

a. Requirements to implement the technology-based controls including the nine minimum controls determined on a BPJ basis;

b. Narrative requirements which insure that the selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan;

c. Water quality-based effluent limits under 40 CFR 122.44(d)(1) and 122.44(k), requiring, at a minimum, compliance with, no later than the date allowed under the State's WQS, the numeric performance standards for the selected CSO controls, based on average design conditions specifying at least one of the following:

i. A maximum number of overflow events per year for specified design conditions consistent with II.C.4.a.i; or

ii. A minimum percentage capture of combined sewage by volume for treatment under specified design conditions consistent with II.C.4.a.ii; or

iii. A minimum removal of the mass of pollutants discharged for specified design conditions consistent with II.C.4.a.iii; or

iv. performance standards and requirements that are consistent with II.C.4.b. of the Policy.

d. A requirement to implement, with an established schedule, the approved post-construction water quality assessment program including requirements to monitor and collect sufficient information to demonstrate compliance with WQS and protection of designated uses as well as to determine the effectiveness of CSO controls.

e. A requirement to reassess overflows to sensitive areas in those cases where elimination or relocation of the overflows is not physically possible and economically achievable. The reassessment should be based on consideration of new or improved techniques to eliminate or relocate overflows or changed circumstances that influence economic achievability;

f. Conditions establishing requirements for maximizing the treatment of wet weather flows at the POTW treatment plant, as appropriate, consistent with Section II.C.7. of this Policy;

g. A reopener clause authorizing the NPDES authority to reopen and modify the permit upon determination that the CSO controls fail to meet WQS or protect designated uses. Upon such determination, the NPDES authority should promptly notify the permittee and proceed to modify or reissue the permit. The permittee should be

required to develop, submit and implement, as soon as practicable, a revised CSO control plan which contains additional controls to meet WQS and designated uses. If the initial CSO control plan was approved under the demonstration provision of Section II.C.4.b., the revised plan, at a minimum, should provide for controls that satisfy one of the criteria in Section II.C.4.a. unless the permittee demonstrates that the revised plan is clearly adequate to meet WQS at a lower cost and it is shown that the additional controls resulting from the criteria in Section II.C.4.a. will not result in a greater overall improvement in water quality.

Unless the permittee can comply with all of the requirements of the Phase II permit, the NPDES authority should include, in an enforceable mechanism, compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA. For major permittees, the compliance schedule should be placed in a judicial order. Proper compliance with the schedule for implementing the controls recommended in the long-term CSO control plan constitutes compliance with the elements of this Policy concerning planning and implementation of a long term CSO remedy.

3. Phasing Considerations

Implementation of CSO controls may be phased based on the relative importance of and adverse impacts upon WQS and designated uses, as well as the permittee's financial capability and its previous efforts to control CSOs. The NPDES authority should evaluate the proposed implementation schedule and construction phasing discussed in Section II.C.8. of this Policy. The permit should require compliance with the controls proposed in the long-term CSO control plan no later than the applicable deadline(s) under the CWA or State law. If compliance with the Phase II permit is not possible, an enforceable schedule, consistent with the Enforcement and Compliance Section of this Policy, should be issued in conjunction with the Phase II permit which specifies the schedule and milestones for implementation of the long-term CSO control plan.

V. Enforcement and Compliance

A. Overview

It is important that permittees act immediately to take the necessary steps to comply with the CWA. The CSO enforcement effort will commence with

an initiative to address CSOs that discharge during dry weather, followed by an enforcement effort in conjunction with permitting CSOs discussed earlier in this Policy. Success of the enforcement effort will depend in large part upon expeditious action by NPDES authorities in issuing enforceable permits that include requirements both for the nine minimum controls and for compliance with all other requirements of the CWA. Priority for enforcement actions should be set based on environmental impacts or sensitive areas affected by CSOs.

As a further inducement for permittees to cooperate with this process, EPA is prepared to exercise its enforcement discretion in determining whether or not to seek civil penalties for past CSO violations if permittees meet the objectives and schedules of this Policy and do not have CSOs during dry weather.

B. Enforcement of CSO Dry Weather Discharge Prohibition

EPA intends to commence immediately an enforcement initiative against CSO permittees which have CWA violations due to CSOs during dry weather. Discharges during dry weather have always been prohibited by the NPDES program. Such discharges can create serious public health and water quality problems. EPA will use its CWA Section 308 monitoring, reporting, and inspection authorities, together with NPDES State authorities, to locate these violations, and to determine their causes. Appropriate remedies and penalties will be sought for CSOs during dry weather. EPA will provide NPDES authorities more specific guidance on this enforcement initiative separately.

C. Enforcement of Wet Weather CSO Requirements

Under the CWA, EPA can use several enforcement options to address permittees with CSOs. Those options directly applicable to this Policy are section 308 Information Requests, section 309(a) Administrative Orders, section 309(g) Administrative Penalty Orders, section 309 (b) and (d) Civil Judicial Actions, and section 504 Emergency Powers. NPDES States should use comparable means.

NPDES authorities should set priorities for enforcement based on environmental impacts or sensitive areas affected by CSOs. Permittees that have voluntarily initiated monitoring and are progressing expeditiously toward appropriate CSO controls should be given due consideration for their efforts.

1. Enforcement for Compliance With Phase I Permits

Enforcement for compliance with Phase I permits will focus on requirements to implement at least the nine minimum controls, and develop the long-term CSO control plan leading to compliance with the requirements of the CWA. Where immediate compliance with the Phase I permit is infeasible, the NPDES authority should issue an enforceable schedule, in concert with the Phase I permit, requiring compliance with the CWA and imposing compliance schedules with dates for each of the nine minimum controls as soon as practicable. All enforcement authorities should require compliance with the nine minimum controls no later than January 1, 1997. Where the NPDES authority is issuing an order with a compliance schedule for the nine minimum controls, this order should also include a schedule for development of the long-term CSO control plan.

If a CSO permittee fails to meet the final compliance date of the schedule, the NPDES authority should initiate appropriate judicial action.

2. Enforcement for Compliance With Phase II Permits

The main focus for enforcing compliance with Phase II permits will be to incorporate the long-term CSO control plan through a civil judicial action, an administrative order, or other enforceable mechanism requiring compliance with the CWA and imposing a compliance schedule with appropriate milestone dates necessary to implement the plan.

In general, a judicial order is the appropriate mechanism for incorporating the above provisions for Phase II. Administrative orders, however, may be appropriate for permittees whose long-term control plans will take less than five years to complete, and for minors that have complied with the final date of the enforceable order for compliance with their Phase I permit. If necessary, any of the nine minimum controls that have not been implemented by this time should be included in the terms of the judicial order.

D. Penalties

EPA is prepared not to seek civil penalties for past CSO violations, if permittees have no discharges during dry weather and meet the objectives and schedules of this Policy. Notwithstanding this, where a permittee has other significant CWA violations for which EPA or the State is taking judicial

action, penalties may be considered as part of that action for the following:

1. CSOs during dry weather;
2. Violations of CSO-related requirements in NPDES permits; consent decrees or court orders which predate this policy; or
3. Other CWA violations.

EPA will not seek penalties for past CSO violations from permittees that fully comply with the Phase I permit or enforceable order requiring compliance with the Phase I permit. For permittees that fail to comply, EPA will exercise its enforcement discretion in determining whether to seek penalties for the time period for which the compliance schedule was violated. If the milestone dates of the enforceable schedule are not achieved and penalties are sought, penalties should be calculated from the last milestone date that was met.

At the time of the judicial settlement imposing a compliance schedule implementing the Phase II permit requirements, EPA will not seek penalties for past CSO violations from permittees that fully comply with the enforceable order requiring compliance with the Phase I permit and if the terms of the judicial order are expeditiously agreed to on consent. However, stipulated penalties for violation of the judicial order generally should be included in the order, consistent with existing Agency policies. Additional guidance on stipulated penalties concerning long-term CSO controls and attainment of WQS will be issued.

Paperwork Reduction Act

The information collection requirements in this policy have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq* and have been assigned OMB control number 2040-0170.

This collection of information has an estimated reporting burden averaging 578 hours per response and an estimated annual recordkeeping burden averaging 25 hours per recordkeeper. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch; EPA; 401 M Street SW. (Mail Code 2136); Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and

Budget, Washington, DC 20503, marked
"Attention: Desk Officer for EPA."

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Tuesday
April 19, 1994

Part VIII

**Department of
Transportation**

Coast Guard

**33 CFR Part 151
Recordkeeping of Refuse Discharges
From Ships; Final Rule**

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 151

[CGD 92-71]

RIN 2115-AE17

Recordkeeping of Refuse Discharges From Ships

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing regulations to require that all manned, oceangoing U.S. vessels 12.2 meters (approximately 40 feet) or more in length engaged in commerce and all manned fixed or floating platforms subject to the jurisdiction of the United States keep records of garbage discharges and disposals. Regulations specifying the vessels and platforms required to maintain these records are mandated by statute. The use of shipboard garbage discharge and disposal records will promote compliance, facilitate enforcement, and reduce the amount of plastics discharged into the marine environment.

EFFECTIVE DATE: May 19, 1994.

ADDRESSES: Unless otherwise indicated, documents referenced in this preamble are available for inspection and copying at the office of the Executive Secretary, Marine Safety Council (G-LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593-0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267-6234.

FOR FURTHER INFORMATION CONTACT: Lieutenant Jonathan C. Burton, Project Manager, Marine Environmental Protection Division (G-MEP), (202) 267-6714.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are Lieutenant Jonathan C. Burton, Project Manager, Marine Environmental Protection Division, and Mr. Stephen H. Barber, Project Counsel, Office of Chief Counsel.

Regulatory History

On May 20, 1993, the Coast Guard published a notice of proposed rulemaking entitled "Recordkeeping of Refuse Discharges From Ships" in the *Federal Register* (58 FR 29482). The Coast Guard received 23 letters commenting on the proposal. A public

hearing was not requested and one was not held.

These statutory provisions had been addressed previously in a Coast Guard notice of proposed rulemaking (54 FR 37084; September 6, 1989) but the regulatory section, as proposed, failed to receive OMB approval under the Paperwork Reduction Act and was deleted from the interim rule published on May 2, 1990 (55 FR 18578).

Background and Purpose

The Marine Plastic Pollution Research and Control Act of 1987 (the Act) (Pub. L. 100-220) implements Annex V of MARPOL 73/78. Section 2107 of the Act (33 U.S.C. 1903 (b)(2)(A)) requires that the Secretary of the Department in which the Coast Guard is operating prescribe regulations which (a) require certain U.S. "ships" (defined in the Act to include fixed or floating platforms, as well as vessels) to maintain refuse record books and (b) specify the ships to which the regulations apply. Refuse record books will be used to document waste discharges from the ships.

Despite implementation of other Coast Guard Annex V regulations to date, large amounts of plastic continue to wash ashore, obstruct navigation, and entangle marine life. Very likely, much of this plastic was illegally discharged as garbage from ships. According to the Coast Guard's "MARPOL Reception Facility Study," an informal survey of all Annex V reception facilities on the East and Gulf coasts, less than 20 percent of the vessels calling at these ports off-load garbage at a reception facility. Yet, Coast Guard boarding officers frequently find no trace of garbage, separated plastics, or incinerated ash on ships that doubtlessly generate large quantities of garbage, such as vessels on long voyages. The evidence strongly suggests that, despite current regulations, large amounts of garbage are still being discharged overboard before plastics are separated out for later disposal ashore or incineration aboard.

Though no regulation can stop a crew member intent on violating the regulation from illegally discharging garbage, certain measures can be taken to reduce the number of intentional, as well as negligent, illegal discharges. Under 33 CFR 151.63(a), the master or person in charge of a "ship" is made personally responsible for all discharge or disposal operations. Therefore, a requirement for the master or person in charge to maintain detailed records of each disposal operation will promote knowledge of the discharge regulations and awareness of waste handling practices on the ship, and provide a

means of verifying that masters and persons in charge are carrying out their responsibilities. These records will provide a more complete and accurate source of information for boarding officers than would the recollections, over the duration of a voyage, of the master or person in charge. The Coast Guard has already identified the benefits of records by stating in 33 CFR 151.63(b)(2) that log entries indicating discharge operations may be considered by enforcement personnel in evaluating compliance.

Furthermore, the Coast Guard's "MARPOL Reception Facility Study" states that refuse recordkeeping is critical to strengthening enforcement efforts. It is clear that the previous regulations have failed to curtail the growing pollution problem. The waste management plans required by 33 CFR 151.57, which, it was hoped, would satisfy the statutory mandate for a refuse record book, have in and of themselves produced inadequate results. It is now believed that, in conjunction with waste management plans, refuse recordkeeping will measurably improve the management of refuse aboard ships. In addition, it will provide data for evaluating this regulatory program and its effect on the environment. Coast Guard boarding officers are noting with continued frequency that foreign vessels are maintaining refuse records in order to demonstrate that they follow proper discharge procedures.

In addition to this rulemaking, the Coast Guard is pursuing adoption of an international requirement for refuse recordkeeping through the International Maritime Organization (IMO). In this regard, the Coast Guard submitted an action paper at IMO's Marine Environment Protection Committee meeting in July 1993.

Discussion of Comments and Changes

I. General Comments

(1) Three comments were in favor of the regulations. Of these three, one saw no problems with the rule and the other two encouraged vigorous enforcement.

The Coast Guard intends to vigorously enforce these regulations.

(2) One comment stated that the rule would have no effect on the discharge of garbage in the marine environment since those who illegally dump would merely falsify records and continue the practice.

The recording of waste disposal will aid in enforcement by identifying those ships that do not appear to have policies and disposal methods that support the records they provide.

(3) One comment suggested that methods other than recordkeeping be used to reduce the amount of garbage in the marine environment. Specifically, they proposed that plastic packaging materials be banned and replaced with biodegradable materials, that ship operators be required to provide garbage handling personnel, and that on board waste processing equipment be required.

These ideas may have merit and deserve future consideration. However, they are outside of the scope of this rulemaking, which is limited to implementing 33 U.S.C. 1903(b)(2)(A).

(4) One comment stated that this recordkeeping should be required on the international level to avoid duplicative national laws.

Though this idea may have merit, it is outside of the scope of this rulemaking.

II. Applicability (Section 151.55(a))

(1) The Coast Guard is in the process of converting measurements in many of its regulations to the metric system. Therefore, § 151.55(a)(1) has been changed to refer to vessels of "12.2 meters (approximately 40 feet)."

(2) Eleven comments were received from representatives of the offshore oil and gas industry indicating that regulations on discharges already exist for fixed and floating platforms and that this additional requirement would be unnecessary and redundant.

Offshore platforms are made subject to the recordkeeping requirement in 33 U.S.C. 1903(b)(2)(A)(i) because platforms are included in the term "ship" as used in that provision. However, this rulemaking should have little effect on platform operators as all discharges, except for ground virtual waste beyond 12 nautical miles, are prohibited already under 33 CFR 151.73.

(3) One comment suggested that vessels or platforms discharging garbage to offshore supply vessels (OSV's) be required to provide the OSV with records indicating the generator and amount of waste so that the OSV can make an accurate record of waste it discharges ashore.

The records required by this rule are for establishing compliance and maintaining a statistical record of garbage discharged at sea. This will be done by inspections on the ships in question. Therefore, there is no justification to put an additional burden on vessels and platforms by requiring them to provide OSV's with garbage records. Furthermore, an OSV is not required under this rule to keep records of garbage it takes as cargo from another

vessel or platform. The word "garbage", as used throughout part 151, is defined in 33 CFR 151.05 as waste generated during the normal operation of the ship. Garbage taken from a vessel or platform for shipment ashore is considered cargo on the OSV and is regulated by the Shore Protection Act of 1988 (33 U.S.C. 2601 *et seq.*). It can not be mixed with the OSV's ship-generated garbage and disposed of at sea.

(4) One comment from an association representing a large segment of the passenger vessel industry recommended that passenger vessels certificated for ocean service, though engaged exclusively in inland trade, not be required to maintain refuse records.

While these vessels usually discharge at shore reception facilities, it would be difficult, if not impossible, for enforcement officials to determine that these vessels never operate outside of inland waters. However, § 151.55(c)(6) has been changed to exclude garbage discharged to shore reception facilities from the requirement that garbage be described by category. Shore discharges do not have the limitations as to contents as to discharges at sea. This change significantly reduces the reporting burden for passenger, as well as other, vessels that discharge to shore.

(5) One comment from a representative of the coastal towing industry stated that their vessels rarely operate outside of 20 miles, have small crews, and are able to retain their garbage on board for shore disposal. Therefore, they should be exempt from the rule.

The capability of retaining garbage on board for disposal ashore is not sufficient justification to be exempted from this rule. However, as with other vessels, if towing vessels retain their garbage on board for disposal to a shore reception facility, they would be exempt from the requirements that they categorize their garbage under § 151.55(d)(6).

(6) Two comments stated that foreign ships were a major contributor to debris in the marine environment and should be included in this rule.

These regulations are limited by 33 U.S.C. 1903(b)(2)(A) to ships of United States registry or nationality or operated under the authority of the United States.

(7) One comment stated that recreational vessels were a major cause of garbage in the marine environment and should be included in this requirement.

As discussed in the preamble of the proposed rule, the majority of recreational vessels do not operate outside of the inland or coastal waters of the United States. They usually are

engaged in voyages of short duration and do not generate large amounts of garbage. Recreational vessels have a greater ability to retain garbage on board until returning to port, where they usually have access to trash receptacles at the marina. Additionally, there is no requirement for recreational vessels to maintain a log of any kind, making recordkeeping a greater burden.

(8) One comment stated that there is no evidence that vessels are the problem and that the major cause of garbage in the water is sewage outflows.

An increasing number of Coast Guard pollution cases clearly document a pattern of illegal garbage discharges from vessels. This is confirmed each year by the beach cleanups conducted under the guidance of the Center for Marine Conservation. While sewage outflows may be a significant cause of garbage in the marine environment, regulation of these outflows is outside of the scope of this rulemaking.

(9) One comment stated that public vessels are a major cause of garbage in the water.

Public vessels were not required to be in compliance with the Marine Plastic Pollution Research and Control Act of 1987 until December 31, 1993. Guidance has been, or will be, developed by the agencies responsible for these vessels.

(10) One comment questioned why this rule applies to vessels of 40 feet or more, where the 1989 proposal applied to vessels of 79 feet or more.

The Coast Guard lowered the size requirement in order to include classes of vessels that have been identified as possible polluters in a study conducted by the Coast Guard and submitted to Congress on the implementation of MARPOL, Annex V. This study, entitled "Compliance with the Marine Plastic Pollution Research and Control Act of 1987", was required by that Act. There is further discussion of the 40 foot threshold in the preamble to the May 20, 1993, notice of proposed rulemaking (58 FR 29483).

III. Information on Discharge or Disposal Operations (Section 151.55(c))

(1) The MARPOL protocols request that the quantity of garbage disposed of at a shore reception facility be recorded in cubic meters. Therefore, § 151.55(c)(5) has been changed to this standard.

(2) One comment stated that the requirement to log the distance to shore in addition to recording the latitude and longitude was unnecessary. The comment stated that many vessels do not routinely keep track of the vessels' distance from shore.

The provisions in §§ 151.51 through 151.77 that specify where each type of garbage can be discharged are based on the distance of the vessel from shore. Effective enforcement depends on knowing how far from shore a particular type of garbage was discharged. However, recognizing that calculating the precise distance from shore using the latitude and longitude is burdensome, the Coast Guard has changed § 151.55(c)(4) to allow the distance from shore to be estimated. This alleviates the need for a specific calculation.

(2) One comment recommended that the number of categories for recording of the contents of garbage be reduced.

Categories are necessary because the discharge regulations in §§ 151.51 through 151.77 are based on garbage contents. However, upon review of the various regulations, it was determined that none of the regulations applicable to vessels made a distinction between ground and unground victual waste. [Section 151.73 for platforms refers to ground victual wastes, but this is the only category allowed to be discharged from a platform.] Therefore, § 151.55(c)(6) has been changed to combine ground and unground victual waste into a single category. The word "victual" replaces "food", as used in the proposed rule, because it is a defined word used throughout part 151. [See § 151.05.]

(3) One comment stated that a single book should be developed to record the discharge of oil, noxious liquid substances, and garbage.

This rule allows ship operators to use such a book at their option. To require such a book is unnecessarily restrictive.

IV. Cost to Industry

(1) One comment stated that the estimate used in the draft Regulatory Evaluation of two minutes to sort garbage and record its disposal was too short a time.

The two minute estimate was intended only to cover the recording of the disposal of garbage, not the sorting as well. The sorting of garbage for disposal is an action that already must be undertaken to comply with the discharge restrictions of §§ 151.51 through 151.77, regardless of whether or not a ship is required to record that disposal. Sorting was not considered when determining the two minute estimate. Nevertheless, the Coast Guard has reevaluated the time necessary to determine and record the amount and type of garbage being discharged and has found that five minutes per entry is a more reasonable estimate.

(2) One comment was received from an association representing the towing industry stating that the Coast Guard's estimate of the number of coastal towing boats that would be subject to this rule was incorrect. Rather than the number 23, as used in the draft Regulatory Evaluation, they stated that the correct number was closer to 350.

The Regulatory Evaluation has been changed accordingly. In preparing the draft Regulatory Evaluation, the wrong number was inadvertently transposed and misstated. The Coast Guard agrees with the number provided by the comment.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It is not significant under the "Department of Transportation Regulatory Policies and Procedures" (44 FR 11040; February 26, 1979). A final Regulatory Evaluation has been prepared and is available in the docket for inspection or copying where indicated under ADDRESSES. The following is a summary of the Evaluation.

The total annual projected cost to industry of requiring that refuse records be maintained is estimated to be \$12,370,915.54. The increase in this total, as compared to that in the draft Regulatory Evaluation, is due to the increase in the estimated recording time from two to five minutes. The total annual projected cost does not reflect the potential reduction in reporting time for ships discharging at shore facilities or incinerating on board. In the final rule, ship operators who discharge on shore or who incinerate on board no longer need to categorize the contents of their garbage. Nor does the projected cost reflect the potential reduction in reporting time resulting from the deletion of the requirement that the ship's distance from shore be precisely calculated. In the final rule, the distance may be estimated.

The Coast Guard based the implementation costs of these regulations on the following categories of U.S. ships: freight and tank vessels, tug and tow vessels, small fishing vessels (less than 300 gross tons), large fishing vessels (300 gross tons or more), passenger vessels, cruise vessels, vessels engaged in offshore oil and gas operations, research and other miscellaneous classes of vessels, and manned fixed and floating platforms. The annual cost for a ship to comply with these regulations was calculated by

multiplying the time it would take to complete a refuse record entry (five minutes), by the number of discharges per day (one), by the average wage per minute of the deck officer, chief steward, or operator aboard each category of ship, and by the average number of discharges per year for each category of ship.

The annual cost per ship in each category is estimated to be: freight or tank vessel: \$2,145.79; tug or tow vessel: \$804.67; small fishing vessel: \$468.48; large fishing vessel: \$585.21; passenger vessel: \$804.67; cruise vessel: \$6,437.37; offshore oil or mineral vessel: \$890.01; research or other miscellaneous class of vessel: \$420.62; and manned fixed or floating platform: \$128.01.

The estimated numbers of vessels affected in each category are: 586 freight and tank vessels, 350 tug and tow vessels, 16,948 small fishing vessels, 224 large fishing vessels, 2,870 passenger vessels, 4 cruise vessels, 276 offshore oil and mineral vessels, 124 research and other miscellaneous classes of vessels, and 1,000 manned fixed and floating platforms.

The total annual cost for each category of ship was calculated by multiplying annual cost per ship by the estimated number of ships effected in each category: freight and tank vessels: \$1,257,432.94; tug and tow vessels: \$281,634.50; small fishing vessels: \$7,939,799.04; large fishing vessels: \$131,087.04; passenger vessels: \$2,309,402.90; cruise vessels: \$25,749.48; offshore oil and mineral vessels: \$245,642.76; research and other miscellaneous classes of vessels: \$52,156.88; and manned fixed and floating platforms: \$128,010.00.

The average annual burden of this requirement per respondent is estimated to be 20.9 hours. This average was calculated by dividing the total number of hours spent on recordkeeping annually, by the total number of applicable ships.

Small Entities

The Coast Guard does not have accurate information on how many vessels or manned fixed or floating platforms would qualify as small entities and what the economic impact on them would be. However, because the recordkeeping is expected to require only five minutes per day and no particular record book or format is prescribed, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains a collection of information requirement. The Coast Guard has submitted the requirements to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and OMB has approved them. The section number is § 151.55 and the corresponding OMB approval number is OMB Control Number 2115-0613.

Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under section 2.B.2 of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation. The regulations are administrative in nature and are expected to have some positive but no negative impact on the environment. The regulations should contribute to the reduction of the occurrence of plastic, as well as other ship-generated garbage, in the marine environment. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 151

Oil pollution, Reporting and recordkeeping requirements, Water pollution control.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 151 as follows:

PART 151—VESSELS CARRYING OIL, NOXIOUS LIQUID SUBSTANCES, GARBAGE, MUNICIPAL OR COMMERCIAL WASTE, AND BALLAST WATER

1. The authority citation for part 151 continues to read as follows:

Authority: 33 U.S.C. 1321(j)(1)(C) and 1903(b); E.O. 11735, 3 CFR, 1971-1975 Comp., p. 793; 49 CFR 1.46.

2. Section 151.55 is added to read as follows:

§ 151.55 Recordkeeping requirements.

(a) This section applies to the following:

(1) Each manned oceangoing ship (other than a fixed or floating platform) of 12.2 meters (approximately 40 feet) or more in length that is engaged in commerce and that is documented under the laws of the United States or numbered by a State.

(2) Each manned fixed or floating platform subject to the jurisdiction of the United States.

(b) The master or person in charge of each ship under paragraph (a)(1) or (a)(2) of this section shall ensure that a written record is maintained on the ship of each of the following garbage discharge or disposal operations:

- (1) Discharge overboard.
- (2) Discharge to another ship.
- (3) Discharge to a reception facility.
- (4) Incineration on the ship.

(c) The record under paragraph (b) of this section must contain the following information on each discharge or disposal operation:

- (1) The type of operation as described under paragraphs (b)(1) through (b)(4) of this section.
- (2) The date and time of the operation.
- (3) If the operation was conducted at a port, the name of the port.
- (4) If the operation was not conducted at a port, the latitude and longitude of

the location where the operation was conducted and the estimated distance of that location from shore. If the operation involved off-loading to another ship, the identity of the receiving ship by name and official number.

(5) The amount of garbage involved, described by volume in cubic meters.

(6) For discharges into the sea, a description of the contents of the garbage, described by the following categories:

- (i) Plastic material.
- (ii) Floating dunnage, lining, or packing material.
- (iii) Ground paper products, rags, glass, metal, bottles, crockery, or other similar garbage.
- (iv) Unground paper products, rags, glass, metal, bottles, crockery, or other similar garbage.

(v) Victual wastes.

(vi) Incinerated ash.

(vii) Incinerated plastic residue.

(d) The record under paragraph (b) of this section must be prepared at the time of the operation, certified as correct by the master or person in charge of the ship, maintained on the ship for two years following the operation, and made available for inspection by the Coast Guard.

3. In § 151.63, paragraph (b)(2) is revised to read as follows:

§ 151.63 Shipboard control of garbage.

* * * * *

(b) * * *

(2) Records under § 151.55 or log entries of garbage discharges.

* * * * *

Dated: April 1, 1994.

A.E. Henn,

Rear Admiral, U.S. Coast Guard Chief, Office of Marine Safety, Security and Environmental Protection.

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